IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1058.

EDWARD F. O'BRIEN, *et al.*,
Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdictional Statement Filed January 31, 1973.
Probable Jurisdiction noted May 7, 1973.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972.

No. 72-1058.

- -X

EDWARD F. O'BRIEN, on behalf of Himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIS GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DE LEON, EMANUEL RUSSO, MC KINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDY KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES,

GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULTZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Petitioners,

vs.

ALBERT SKINNER, SHERIFF, MONROE COUNTY, and KENNETH POWER and ROBERT NORTHRUP, et. al., being the Monroe County Board of Elections,

Respondents.

- -X

CHRONOLOGICAL LIST OF IMPORTANT DATES

Item	Date
Order to show cause, affirmation, verified petition, supporting affidavit, and Exhibit A served on appellees	October 11, 1972
Answer and motion to dismiss served on appellants	October 17, 1972
Hearing in New York Supreme Court, Monroe County (Blauvelt, J.)	October 18, 1972
Judgment of New York Supreme Court, Monroe County (Blauvelt, J.) entered in Monroe County Clerk's Office	October 24, 1972
Notice of appeal by appellants and notice of cross-appeal by appellees served and entered	October 24, 1972
Oral argument before the New York Supreme Court, Appellate Division, Fourth Department	October 26, 1972
Order of the New York Supreme Court, Appellate Division, Fourth Department entered	October 27, 1972
Notice of appeal by appellees served and entered	October 27, 1972

Oral argument before the New York Court of Appeals	October 31, 1972
Order of the New York Court of Appeals entered	November 3, 1972
Notice of appeal by appellants served	November 3, 1972
Appellants' oral application to Judge Scileppi for provisional relief pending appeal orally denied	November 4, 1972
Appellants' application to Mr. Justice Marshall for provisional relief pending appeal filed	November 4, 1972
Order of Mr. Justice Marshall denying appellants' application entered	November 6, 1972
Probable jurisdiction noted	May 7, 1973

ORDER TO SHOW CAUSE.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF MONROE.

- -X

EDWARD F. O'BRIEN, on behalf of Himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGRAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIS GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DE LEON, EMANUEL RUSSO, MC KINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY

PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULTZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Petitioners,

vs.

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, et. al., being the Monroe County Board of Elections,

Respondents.

- -X

Upon the annexed verified petition, the affidavit of Jean M. Askham, the affidavit of William D. Eggers, and sufficient cause appearing, it is

Ordered that respondents or their attorneys show cause before this Court in a special term, Hall of Justice, Rochester, New York, on October 17, 1972 at 10:00 a.m. why an order should not be entered (1) directing the respondent

ORDER TO SHOW CAUSE

Sheriff Albert W. Skinner to permit petitioners to register to vote at the main office of the Board of Elections; (2) in the alternative directing respondent Albert W. Skinner and respondent Board of Elections to take appropriate steps to permit petitioners to register to vote at the Monroe County Jail, and (3) directing respondent Board of Elections to hold open their books to complete and effect such registration; (4) directing respondent Sheriff Albert W. Skinner and respondent Board of Elections to make arrangements to permit petitioners to vote in person at their respective polling places, by absentee ballot, or otherwise, and it is further

ORDERED that this order and the supporting papers shall be served on

ORDER TO SHOW CAUSE

respondent Sheriff Albert W. Skinner by delivering a copy thereof to his office at the Hall of Justice on or before October 12, 1972 at 6 p.m. and on respondent Board of Elections by delivering a copy thereof to its office at 36 Main Street, Rochester, New York on or before October 11, 1972 at 6 p.m.

s/ EMMETT J. SCHNEPP
J.S.C.

AFFIRMATION OF WILLIAM D. EGGERS IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE.

WILLIAM D. EGGERS, attorney at law of the State of New York, affirms the following to be true under penalties of perjury:

1. I am an attorney at law duly admitted to practice in the State of New York.

2. This proceeding is brought on by an order to show cause because of the limited time within which effective relief may be granted. October 10, 1972 is the last official day for qualified persons to register to vote in the general election to be held in November 1972. Unless this proceeding is brought on to be heard as soon as practical, the Board of Elections will close its books for registrations, the petitioners will be deprived of

their right to participate in the general election, and they will be without an effective remedy for such deprivation.

October 10, 1972

WILLIAM D. EGGERS

PETITION.

[TITLE OMITTED IN PRINTING]

Petitioners, Edward F. O'Brien, et. al., on behalf of himself and all others similarly situated in Monroe County (hereinafter "Petitioners") for their complaint against the respondents herein, allege as follows:

1. Petitioners are of legal voting age, and are residents of the State of New York and County of Monroe.

2. Petitioners are presently incarcerated in the Monroe County Jail, Rochester, New York, either awaiting trial, or as a result of conviction of a misdemeanor offense.

3. None of the petitioners is excluded from the suffrage as a result of felony conviction or otherwise as provided under Section 152 of the Election Law of New York or elsewhere under the Laws of New York.

PETITION

4. Petitioners are desirous of exercising their constitutionally protected franchise in the forthcoming General Election as is evidenced by their execution of applications to register and vote, attached hereto as Exhibit "A".

5. Attempts have been made on behalf of petitioners by the League of Women Voters, the American Civil Liberties Union and others, to secure for petitioners the right to register to vote, by absentee ballot or otherwise, in said election. Such attempts have been denied by respondents from August, 1972 to the present day, being the last day for registration pursuant to the Election Law. A recitation of the aforesaid attempts and denials is attached hereto in the form of the sworn affidavit of Jean M. Askham, dated October 10, 1972.

PETITION

6. The aforesaid denials have been and continue to be wrongful, without basis in law or fact, and constitute actions by respondents in excess of their authority, and deny to petitioners the rights guaranteed to them by the Election Law, the Constitution of the State of New York, and the Constitution of the United States.

7. Petitioners have no adequate remedy through the administrative process or by law, other than that sought herein.

8. No application has been made for the same or similar relief.

WHEREFORE, Petitioners, and each of them, respectfully request this Court:

1. To compel, by order pursuant to Section 331 of the Elections Law and Article 78 of the New York Civil Practice Law and Rules, and such other laws of the

PETITION

United States and the State of New York as it shall find applicable, the respondent Board of Elections to register petitioners, by absentee form or otherwise to vote in the forthcoming General Election;

2. Pending the registration sought above, that the Court order the books and rolls of the respondent Board of Elections kept open and available for said registration;

3. That the Court order respondent Skinner to allow necessary access to Petitioners by the Board of Elections and other such persons as may be necessary to effectuate the registration sought;

4. That the Court order respondents to take all necessary measures to enable and assist Petitioners to vote in the forthcoming election, either in person, by absentee ballot, or otherwise.

PETITION

5. For such other relief as to the Court shall appear necessary and reasonable to protect the rights of petitioners.

Respectfully submitted,

RUTH B. ROSENBERG
WILLIAM D. EGGERS
DAVID N. KUNKEL
Attorneys for Petitioners

PETITION

State of New York,
County of Monroe,
City of Rochester, ss:

EDWARD F. O'BRIEN, being duly sworn, says: I am one of the petitioners named in the foregoing petition, and that the said petition is true to my knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

s/ EDWARD F. O'BRIEN

[jurat omitted in printing]

AFFIDAVIT OF JEAN M. ASKHAM IN SUPPORT OF PETITION.

State of New York,
County of Monroe,
City of Rochester, ss:

JEAN M. ASKHAM, being duly sworn, deposes and says that:

1. She is a resident of Monroe County residing at 28 Henderson Drive, Penfield, New York, and is Voter Service Chairman and Second Vice President of the League of Women Voters of the Rochester Metropolitan Area, Inc.

2. On or about July 18, 1972, the County of Monroe Legislature authorized an expanded program of voter registration whereby mobile registration units were set up with volunteer registrars to go to any site in the County approved by the Election Commissioners.

AFFIDAVIT OF JEAN M. ASKHAM IN SUPPORT OF PETITION

3. The program was a recognition by the Legislature that many persons entitled to vote were unable to register because of the inconvenient location of the Central Registration facilities together with the hours of operations.

4. The League of Women Voters recognized another group of persons legally entitled to vote but who were unable to register because they were physically restrained from leaving their temporary place of residence, i.e., those persons who were awaiting trial in the County Jail or who were serving sentences as convicted misdemeanants.

5. On or about August, 1972, Mitchell Kaidy, representing the League of Women Voters, requested of Sheriff Skinner that mobile registrars be permitted

to enter the County Jail to register eligible voters and was denied permission.

6. On or about the last week of September deponent discussed the problem of registering prisoners with Robert Northrup, a Commissioner of Elections for Monroe County.

7. Deponent was advised by Mr. Northrup that she was correct in her interpretation of the State Election Law that the aforesaid prisoners had not lost their right to vote or to register to vote but that, as a practical matter, there was no way to accomplish their registration or voting unless the Sheriff took the eligible prisoners to their respective polling places for registration and again on Election Day to vote.

AFFIDAVIT OF JEAN M. ASKHAM IN SUPPORT OF PETITION

8. Deponent then suggested that registration and voting be accomplished by absentee forms as was done in the instance of registering and voting for persons in county homes.

9. Mr. Northrup replied that this could not be done for prisoners since they were neither sick, physically disabled or out of the county.

10. Deponent has reviewed the State Election Law and has consulted with counsel and can find no provision which provides a form for absentee registration or voting by persons eligible to vote who are not physically disabled, ill, or out of the county for business or vacation purposes, although it is perfectly clear that prisoners are physically restrained from

attending the registration locations and polling places for the purpose of exercising their right to vote.

11. Such a discrimination against prisoners denies them the equal protection of the law, their constitutional right to vote, and due process, as all those rights are incorporated into the Fourteenth Amendment in connection with the State of New York's failure to provide a mechanism for their exercising their franchise.

12. On or about October 7, 1972, prisoners in the County Jail in Monroe County were provided with a form on which they could indicate their eligibility to register and vote and their wish to do so, pursuant to the Section 151 of the State Election Law.

AFFIDAVIT OF JEAN M. ASKHAM IN SUPPORT OF PETITION

13. Approximately 72 prisoners completed these forms and they were delivered to deponent late in the day on October 10 by a County Jail official.

14. The original of these applications were delivered to the Commissioners of Elections on October 10, 1972, the last day for registration for the November Presidential and local election. True and correct copies of these applications are attached hereto as Exhibit "A".

15. A demand for assistance was again made upon Andrew Maloney, [sic] (Assistant to the Sheriff) on October 10th and Mr. Maloney [sic] indicated that he was willing to allow absentee registration and voting forms to reach the eligible prisoners but could not deliver the said prisoners to the polling places or

Central Registration facilities for the purpose of registering and voting.

16. On October 10, 1972, Mr. William Stevens, Counsel for the County, indicated that it was too late, in his opinion, to attempt to cure the disenfranchisement of the eligible prisoners and he was unwilling to review the problem and/or intercede with the Election Commissioners with respect to these eligible voters.

17. Accordingly, there is no opportunity for administrative action of this important constitutional question and the time for registration elapses at the end of today.

18. The League of Women Voters, and the Genesee Chapter of the American Civil Liberties Union, and all similar

AFFIDAVIT OF JEAN M. ASKHAM IN SUPPORT OF PETITION

civic minded organizations urge this Court to require the Election Commissioners to permit absentee registration and voting to eligible prisoners in the County of Monroe.

JEAN M. ASKHAM

[jurat omitted in printing]

[proof of service omitted in printing]

EXHIBIT A, ANNEXED TO PETITION.

[TITLE OMITTED IN PRINTING]

October 6, 1972

To: Prisoners awaiting trial and
Prisoners convicted of crimes other than felonies

From: League of Women Voters and American Civil Liberties Union

You have NOT lost your RIGHT to VOTE or your RIGHT to REGISTER because you are in jail.

No one has ever voted from jail here before. No system has been set up to handle it.

But if YOU want to register and/or vote, we'll go to bat for you. We'll see if we can get rid of the stumbling blocks to your voting.

We need your name, home address, and signature NOW. Registration closes Tuesday, October 10.

EXHIBIT A, ANNEXED TO PETITION

To vote here you must be at least 18 years old, a citizen and a resident of Monroe County AND YOU MUST BE REGISTERED.

If you want to vote, fill out the form below.

- -

Yes, I want to register. X

Yes, I want to vote. X

Name: EDWARD F. O'BRIEN

Home address: 703 Thurston Rd., Rochester, N.Y. 14619

Signature: EDWARD F. O'BRIEN

EXHIBIT A, ANNEXED TO PETITION

October 6, 1972

To: Prisoners awaiting trial and
Prisoners convicted of crimes other
than felonies

From: League of Women Voters and American
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But if YOU want to register and/or vote, we'll go to bat for you. We'll see if we can get rid of the stumbling blocks to your voting.

We need your name, home address, and signature NOW. Registration closes Tuesday, October 10.

To vote here you must be at least 18 years old, a citizen and a resident of

EXHIBIT A, ANNEXED TO PETITION

Monroe County AND YOU MUST BE REGISTERED.

If you want to vote, fill out the form below.

- -

Yes, I want to register I'm already registered

Yes, I want to vote. X

Name: Gregory Houston Healy

Home address: 348 University Avenue
Rochester, N.Y. 14607

Signature: GREGORY H. HEALY

[70 identical forms, one for each of the other named appellants, are omitted in printing by agreement of counsel. 4 of these other 70 state that they are already registered and want to vote. The remainder state that they want to both register and vote.]

[Affidavit of Service omitted in Printing.]

ANSWER AND MOTION TO DISMISS.

[TITLE OMITTED IN PRINTING]

Respondents for their Answer in the above entitled matter, allege as follows:

1. The Respondents do not have sufficient information to form a belief as to the truth or falsity of all the allegations made in paragraphs numbered 1, 2, 3, 4 and 8 of the complaint herein.

2. The Respondents deny each and every allegation in paragraphs numbered 5, 6 and 7 of the complaint herein.

Further, the Respondents move to dismiss the Petition in this matter as on its face it fails to state a cause of action.

Dated: Rochester, New York,
October 17, 1972.

WILLIAM J. STEVENS
Attorney for Respondents
Office & Post Office Address
307 County Office Building
Rochester, New York 14614
Phone: 454-7200
MICHAEL K. CONSEDINE, of Counsel

ANSWER AND MOTION TO DISMISS

State of New York
County of Monroe,
City of Rochester, ss:

KENNETH POWER and ROBERT NORTHRUP, being duly sworn, deposes and says that they are Respondents in this action; that they read the foregoing Answer and Motion to Dismiss and know the contents thereof; that the same is true to the knowledge of deponents, except as to the matters therein stated to be alleged on information and belief, and that as to those matters they believe them to be true.

/s/ KENNETH POWERS

/S/ ROBERT NORTHRUP

[Jurat omitted in printing]

[Affidavit of Service omitted in printing]

JUDGMENT (DENOMINATED "ORDER") OF NEW YORK STATE SUPREME COURT, MONROE COUNTY (BLAUVELT, J.).

At a Special Term of the Supreme Court held at the Hall of Justice, Rochester, Monroe County, New York on October 18, 1972.

- -

EDWARD F. O'BRIEN, et al.,

Petitioners,

against

ALBERT SKINNER, Sheriff of Monroe County and KENNETH POWER and ROBERT NORTHRUP, being the Monroe County Board of Elections,

Respondents.

- -

On the order to show cause dated October 11, 1972, the petition, verified by petitioner Edward F. O'Brien on October 11, 1972, the affidavit of Jean M. Askham, sworn to October 10, 1972, exhibit A, constituting a signed statement by each of the petitioners and expressing

the desire of each to register or to vote, with proof of due service thereof, all in support of the petition, the answer of the respondents, verified October 17, 1972, with proof of due service thereof, in opposition thereto, and after hearing William D. Eggers, Esq., attorney for petitioners, in support of the petition, and William J. Stevens, Esq., Monroe County Attorney (Michael K. Consedine, Esq., of Counsel), attorneys for respondents in opposition thereto, and upon the decision of the court dated October 20, 1972, it is ordered

1. The petition is dismissed on the merits, without prejudice to such of the petitioners as may now be registered to

JUDGMENT (DENOMINATED "ORDER") OF NEW YORK STATE SUPREME COURT, MONROE COUNTY (BLAUVELT, J.)

vote to make due and timely applications for absentee ballots.

Dated: October 24, 1972.

Enter

/s/ HON. ARTHUR ERVIN BLAUVELT
Justice Supreme Court

[Affidavit of Service omitted in printing]

DECISION OF THE NEW YORK STATE SUPREME COURT, MONROE COUNTY (BLAUVELT, J.) DATED OCTOBER 20, 1972.

(Printed at pp. 18-21 of the Appellants' Jurisdictional statement.)

ORDER OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT ENTERED OCTOBER 27, 1972.

(Printed at pp. 22-23 of Appellants' Jurisdictional statement.)

ORDER OF THE NEW YORK COURT OF APPEALS ENTERED NOVEMBER 3, 1972.

(Printed at pp. 29-31 of Appellants' Jurisdictional statement.)

OPINION OF THE NEW YORK COURT OF APPEALS.

(Printed at pp. 24-28 of Appellants' Jurisdictional statement.)

OPINION OF MR. JUSTICE MARSHALL,
CIRCUIT JUSTICE.

(Printed at pp. 32-34 of Appellants'

Jurisdictional statement.)

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72 - 1058

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, McKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the MONROE COUNTY BOARD OF ELECTIONS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

RUTH B. ROSENBERG,
DAVID N. KUNKEL,
New York Civil Liberties Union,
c/o One Exchange Street,
Rochester, N. Y. 14614,
WILLIAM D. EGGERS,
League of Women Voters,
c/o One Exchange Street,
Rochester, N. Y. 14614,
Attorneys for Appellants.

BURT NEUBORNE,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1972.

No.

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, MCKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the Monroe County Board of Elections,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdictional Statement.

This is an appeal from the judgment of the New York Court of Appeals sustaining the validity of New York Election Law §§ 117-a and 153-a, which provide for absentee registration and balloting by persons unable to appear personally because they are confined as a result of an illness but fail to provide similar procedures for eligible voters confined in jail awaiting trial or serving misdemeanor sentences, over appellants' contention that the statutes as construed and applied are repugnant to the equal protection clause of the United States Constitution. Appellants submit this statement to establish the jurisdiction of this Court and the substantiality of the federal question presented.

Opinions Below.

The opinion of the New York Court of Appeals is reported at 31 N. Y. 2d 317 (1972). The opinions of the Appellate Division of the Supreme Court, Fourth Judicial Department, and the Supreme Court are not yet reported. All three opinions are set forth as Appendices C (*infra*, at pp. 24-28), B (*infra*, at pp. 22-23), and A (*infra*, at pp. 18-21), respectively.

Jurisdiction.

This suit was commenced on October 11, 1972, in New York Supreme Court, Monroe County, as a "special proceeding" under Article 78 of the New York Civil Practice Law and Rules and §331 of the New York Election Law. Appellants, eligible voters confined to the Monroe County jail, sought declaratory relief and relief

in the nature of mandamus enabling them to register and vote in the November 1972 General Election. They sought: (1) procedures enabling them to register and vote in person either at the jail or at established polling places; (2) a construction of §§ 153-a and 117-a of the New York Election Law to permit appellants to cast ballots by absentee procedures; and (3) a declaration that §§ 153-a and 117-a of the New York Election Law, if construed not to apply to appellants, deny appellants the equal protection of the law under both the New York State and the United States Constitution. Appellees conceded the material allegations in the petition and the New York courts have reached the merits of the controversy.

On November 3, 1972, the New York Court of Appeals reversed an order of the New York Supreme Court, Appellate Division, Fourth Department, entered October 27, 1972, which had modified the judgment of the New York State Supreme Court, Monroe County, entered October 24, 1972. The Court of Appeals dismissed the petition on the grounds that: (1) Election Law §§ 153-a and 117-a permit absentee registration and balloting by persons unable to appear personally, confined in a hospital or institution, and medically incapacitated, but those provisions do not extend similar rights to persons unable to appear personally and confined to jail as pretrial detainees or misdemeanants; (2) registration and voting in the jail and guarded transportation to voting facilities involved unacceptable difficulties and hazards; and (3) the statutes construed not to provide absentee registration and balloting to appellants, but extending absentee registration and balloting to other persons confined and unable to personally appear, do not violate the equal protection guarantees of the New York or United States Constitutions. The decision and order of the Court of Appeals are appended hereto as Appendix D (*infra*, pp. 29-31).

Appellants' application for a stay of the judgment of the New York Court of Appeals was denied by Mr. Justice Marshall on November 6, 1972 (Appendix E, *infra*, pp. 32-34). On November 9, 1972, a notice of appeal to this court was filed in the New York Court of Appeals (Appendix F, *infra*, at pp. 35-36). The jurisdiction of this court to review, on direct appeal, a judgment of the highest court of New York sustaining the validity of New York Election Law §§ 153-a and 117-a over appellants' contention that the statutory provisions, as construed and applied, are repugnant to the Constitution of the United States is conferred by 28 U. S. C. §1257(2). *Dahnke—Walker Mill Co. v. Bondurant*, 257 U. S. 282 (1921).

The Statutes Involved.

The statutes involved in this appeal are New York Election Law §§ 153-a and 117-a. Both statutes are set forth in their entirety in the Appendices. Section 153-a is set forth in Appendix G, *infra*, pages 37-44; §117-a is set forth in Appendix H, *infra*, pages 45-47.

Questions Presented.

1. Whether New York's Election Law §153-a is unconstitutional in that it permits qualified voters who are unable to appear personally for registration because they are confined at home or in a hospital or institution because of illness or physical disability or outside the county of residence because of their duties, occupation or business, to register by absentee registration, but fails to permit absentee registration for qualified voters physically disabled by reason of their being detained in a county jail awaiting trial, who, having been denied administrative relief allowing them to ap-

pear personally for registration, are absolutely denied the exercise of their franchise because of their incarceration.

2. Whether New York Election Law §153-a is unconstitutional in that it permits absentee registration by qualified voters described above but fails to permit absentee registration by qualified voters physically disabled by reason of their being detained in a county jail serving sentences as misdemeanants, who, having been denied administrative relief allowing them to appear personally for registration are absolutely denied the exercise of their franchise because of their incarceration.

3. Whether New York Election Law §117-a is unconstitutional in that it permits absentee balloting by qualified voters who are unable to appear personally at the appropriate polling places because of illness or physical disability (where Election Law §117 permits absentee balloting by qualified voters unable to appear personally on the day of election because of absence from the county of residence on account of vacation, duties, occupation or business requirements elsewhere, or unavoidable absence from residence because of being an inmate at a veterans' bureau hospital), but denies absentee balloting to qualified voters who are unable to appear personally at the appropriate polling places because they are physically detained in a county jail awaiting trial, when they have been denied administrative relief permitting them to appear personally to vote.

4. Whether New York's Election Law §117-a is unconstitutional in that it permits absentee balloting by qualified voters unable to appear personally at the appropriate polling place because of reasons described above, but

denies absentee balloting to qualified voters who are unable to appear personally at the appropriate polling places because they are physically detained in a county jail serving sentences as misdemeanants, when they have been denied administrative relief permitting them to appear personally to vote.

Statement.

The uncontroverted facts are that on October 10, 1972, appellants, comprising 72 eligible voters residing in Monroe County, New York, were incarcerated in Monroe County jail either (1) as pretrial detainees unable to post bail, or (2) as misdemeanants serving sentences. Five of the named appellants were registered to vote. The remainder were not registered. All sought means to cast ballots in the 1972 General Election. From August, 1972, to October 11, 1972, appellants, by their representatives, requested that local election and jail officials provide a mechanism by which appellants could register and cast ballots. Appellants sought mobile registration in the Monroe County Jail, guarded transportation to places of local or central registration, and other means for registration and voting in person, or the appropriate forms for registration and balloting under absentee procedures. Their requests were denied. The Appellate Division has found as a fact that such requests were properly and timely made, and that finding has not been disturbed by the Court of Appeals.

In this proceeding, appellants sought an order directing the Sheriff to permit appellants to be transported to places of registration and voting, directing the Commissioners of Election to permit appellants to register and vote at the jail, directing that appellees, Commissioners of Election, permit appellants to register and

vote by absentee ballot, or directing any other means of relief that would protect the voting rights of appellants, and in the alternative appellants challenged the statutory classification that had the effect of denying them their right to vote while extending the right to vote by absentee procedures to all other persons physically incapacitated who are otherwise eligible voters. The alternative methods of registration and voting sought by appellants have been "reject[ed] out of hand" by the New York Court of Appeals, and that court has construed the absentee provisions of the New York Election Law to deny absentee ballots to appellants. It may not be controverted at this stage of the proceedings that as a result of the Court of Appeals decision appellants and other persons hereafter similarly situated are left without any means of registering and casting ballots.

The federal questions presented in this appeal were raised by appellants at every stage of the state proceedings. Appellants relied on the federal equal protection clause in their petition, show cause order, supporting affidavit, the memorandum of law addressed to the New York State Supreme Court, the brief submitted to the Appellate Division, the brief submitted to the Court of Appeals and all oral arguments. The New York State Supreme Court and the Appellate Division decided in appellants' favor on state grounds and did not reach the federal question. The Court of Appeals, over two strong dissenting opinions, ruled against each of appellants' state law contentions and sustained the validity of New York Election Law §§ 117-a and 153-a over appellants' contention that those provisions, as construed and applied to deny absentee registration and balloting to appellants, were repugnant to the United States Constitution.

The Questions Are Substantial.

1. The New York Court of Appeals departed from the standard of review applied by this court to test classifications affecting the exercise of the franchise.

This Court has uniformly subjected laws limiting the exercise of the right to vote to the most careful judicial scrutiny, under which the burden is upon the State to meet the "strict equal protection test . . . that such laws are *necessary* to promote a *compelling* governmental interest." *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972).

In *Reynolds v. Sims*, 377 U. S. 533, 561-562 (1964), the Court articulated the reasons for the strict standard of review:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

In *Dunn v. Blumstein*, *supra*, at 336, the Court summarized the law:

> By denying some citizens the right to vote, such laws deprive them of "a fundamental political right . . . preservation of all rights." *Reynolds v. Sims*, 377 U. S. 533, 562 (1964). There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes which selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis

> with other citizens in the jurisdiction. [Citations omitted.] This "equal right to vote," *Evans v. Cornman, supra*, at 426, is not absolute; the States have the power to impose voter qualifications and to regulate access to the franchise in other ways. [Citations omitted] But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." [Citations omitted.]

The New York Court of Appeals has failed to follow the controlling equal protection doctrines of this Court. Although that Court "reject[ed] out of hand" all avenues of voting proposed by appellants, it applied the standard of review under which "[the absentee provisions] need only be reasonable in light of the scheme's purposes . . ." Appendix C, *infra*, page 26. As a consequence of that Court's dismissal of appellants' request for other relief appellants are absolutely precluded from voting unless they can cast ballots by absentee methods. Appellants can not state their position with more precision than did Mr. Justice Marshall in denying appellants' application for a stay (Appendix E, *infra*, p. 33):

> . . . [i]t seems clear that the State has rejected alternative means by which appellants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e.g.*, *Harper v. Virginia Board of Elections*, 383 U. S. 667, 670 (1964).

The New York Court of Appeals was mistaken in holding that *McDonald v. Board of Elections*, 394 U. S. 802 (1969), is controlling. That case recognizes that *incidental* burdens on the exercise of voting rights are

not subject to a stringent standard of review and applies the standard of judicial deference because the pretrial detainees in *McDonald* failed to establish that the denial of absentee procedures was more than an incidental burden on their right to vote. *Bullock v. Carter*, 405 U. S. 134, 143 (1972). The crucial factual distinction between *McDonald* and this case is that in *McDonald* the Court found "nothing in the record to [show] . . . that Illinois has in fact precluded appellants from voting." 394 U. S. at 808 and see n. 6 and 7 at 808-809.

That distinction was recognized by this Court in *Goosby v. Osser*, U. S. (#71-6316, 1-17-73). In *Goosby* pretrial detainees attacked the Pennsylvania statute under which they were denied absentee ballots and alleged that their requests for procedures under which they could vote in person had been denied. The Court held that petitioners were entitled to present their contentions to a three judge Court. The Court wrote,

> Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast [to *McDonald*]. Petitioners alleged that, unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot [citation omitted] and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied. Thus, petitioners' complaint alleges a situation which *McDonald* itself suggested might make a different case.

With the construction placed on the New York statute by the decision of the Court of Appeals, and with that Court's dismissal of appellants' other proposed relief, the instant case is distinguishable from *McDonald* for the reasons stated in *Goosby*.

The classification in the instant case affects "the politically disconnected and the financially disabled." (Dissenting opinion of Burke, J.; Appendix C, *infra*, at p. 28.) New York denies the franchise to persons detained in jail awaiting trial because they are unable to afford bail, while it leaves intact the right to vote of persons who are able to post bail. That result conditions the full exercise of the franchise upon wealth, just as surely as the poll tax, which was struck down by this Court in *Harper v. Virginia Board of Elections*, 383 U. S. 663, (1964), where it was emphatically stated that "voter qualifications have no relation to wealth . . ." 383 U. S. at 666.

The classification here is invidious because it favors persons unable to appear personally for balloting on the acceptable, normal grounds of medical disability, while it attaches a further, unnecessary punishment to persons who are accused or who are serving sentences for minor crimes. In the face of an invidious classification, deference to future legislative determination is inappropriate.

Because this state statutory scheme restricts the right to vote as a result of an invidious classification, the strict standard of review applies and the decision of the Court of Appeals is plainly incorrect.

2. The statutory classification denying absentee ballots to appellants is not supported by any compelling state interest.

The New York statutory provisions governing registration and balloting by absentee means distinguish between voters on grounds that fail to withstand judicial scrutiny. As applied to persons who are otherwise literally unable to vote, such provisions are the procedures by which the right to vote is finally granted or denied. Under the New York statutes persons unable to appear personally for registration and voting because they are confined in an institution as a result of a medical disability may vote. If the confinement is judicially imposed for a pretrial detainee or a misdemeanant the right to vote is denied, unless, by mere circumstance, such person is confined out of the county of his residence. The distinctions embodied in that statutory network, with the resulting denial of the right to vote to persons in the positions of appellants, are impermissible.

It is significant that the New York Court of Appeals merely relied on *McDonald v. Board of Elections, supra,* for the proposition that statutory provisions denying absentee ballots to prisoners are reasonable in light of the scheme's purpose. The Court of Appeals made no independent finding of any legitimate state interest that might sustain the denial. As previously noted, however, this Court in *McDonald* was not applying the standard of review required in this instance. This Court there sustained the denial of absentee ballots to persons judicially incapacitated because *on that record* it appeared to be merely more difficult for such persons to vote while persons medically disabled were absolutely unable to appear. That supporting reason has no application on this record. The classification between persons incarcerated within and

those incarcerated without their resident counties was supported in *McDonald* by the argument that that Legislature might have found that "local officials might be too tempted to try to influence the local vote of in-county inmates." (*McDonald*, 394 U. S. at 810). Because that problem may be cured by a number of procedures directed to the conduct of local officials it may not be supposed that the denial of absentee ballots to inmates is "necessary" to serve that goal.

The cornerstone of our jurisprudence is that persons awaiting trial, whether detained in jail or released on bail, are accorded the presumption of innocence. Deprivations flowing from pretrial detention, with its limited function of guaranteeing the appearance of an accused at trial, must be subjected to close scrutiny. Whether the denial of the ballot could be attached as a consequence of committing a misdemeanor is immaterial in this case, because New York has considered this question and has denied the franchise only to convicted felons (New York Election Law §152). As long as pretrial detainees and misdemeanants are permitted to receive and transmit mail, they may exercise their franchise by absentee means with no more burden on jail administrators than that involved in routine correspondence with attorneys and family. It is plain, therefore, that the fact of incarceration does not require the denial of absentee representation and balloting.

Whatever additional burdens are raised for the Commissioners of Election are minor administrative inconveniences not approaching the level of a compelling state interest. The exercise of the ballot by absentee methods involves the same risks, the same administrative procedures, and the same burdens when that right is extended to persons confined in hospitals or institutions for medi-

cal reasons as when that right is extended to persons confined in jails.

It is frivolous to suggest that any administrative inconvenience will arise since many persons in jail are already granted the right to cast ballots by absentee methods. Persons detained in jail out of the county of their residence are "absent from their election districts" and entitled to vote by absentee ballot for President and Vice President under §202 (d) of the Voting Rights Act of 1965 as amended by the Voting Rights Act Amendment of 1970 (42 U. S. C. 1933 aa-1 [d]). Absentee procedures for persons unavoidably absent from their county of residence are provided by N. Y. Election Law §§ 153-a and 117. The procedures jail personnel and election officials follow in administering absentee balloting provisions with respect to persons incarcerated out of their county of residence could apply to appellants without material change. Even if a substantial state interest were at stake,

> . . . the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.

Dunn v. Blumstein, supra, 31 L. Ed. at page 285.

It is respectfully submitted that the decision of the New York Court of Appeals so clearly departs from controlling precedent that the judgment appealed from should be summarily reversed on the merits without further argument. See, *United States v. Haley*, 358 U. S. 644 (1959); *Chamberlin v. Dade County Board*, 377 U. S. 402 (1964). At no stage of these proceedings have

appellees advanced a legislative purpose served by the denial of absentee ballots to appellants that could merit the label of a "compelling state of interest." Accordingly, the appeal is controlled by *Dunn v. Blumstein*, 405 U. S. 330 (1972).

3. The federal questions in this appeal are important.

This appeal raises questions of Constitutional law foreshadowed by *McDonald v. Board of Elections, supra*, and *Goosby v. Osser*, U. S. (#71-6316, 1-17-73), reversing 452 F. 2d 39 (3d Cir. 1970). The *McDonald* decision plainly does not reach the questions now raised. 394 U. S. 802, 808-809, n. 6 and 7. As the Court noted in *Goosby*, appellants' complaint "alleges a situation which *McDonald* itself suggested might make a different case." The instant case reaches this Court after all subsidiary questions have been resolved, all alternative relief denied, and the Constitutional issues framed by the decision of the New York Court of Appeals. The instant appeal, from a final judgment on the merits, presents the *Goosby* question upon a proper record for decision by this Court.

These important Constitutional questions are framed with the specificity and concrete adversity necessary for this Court's consideration. Appellants and appellees have specific continuing interests in the controversy. The wrongful deprivation of the right to register prior to the 1972 General Election, for example, entails a deprivation of the right to enroll in a political party and to participate in the June, 1973, primary election. N. Y. Election Law §§ 186, 191; *Rosario v. Rockefeller* (No. 71-1371). Furthermore, persons incarcerated in 1973 and thereafter as misdemeanants or pretrial detainees will be similarly situated to persons represented by the named ap-

pellants, and will be adversely affected by the judgment appealed from. Under N. Y. Election Law § 117-a (subd. 2) a registered voter may apply for an absentee ballot "not earlier than the 30th and not later than the 7th day before [the] election." Under N. Y. Election Law §153-a (subd. 4), a qualified person may file an application for absentee registration "not earlier than the close of the period of central registration and not later than the last day of local registration before the next following election . . ." N. Y. Election Law §154 (subd. 1) provides that the period of central registration extends through September 18. The short period between the time a qualified voter would first obtain standing and the time necessary to exhaust the administrative and judicial processes will continue to preclude final review by the Supreme Court prior to any General Election. Thus, the Constitutional deprivation resulting from the New York absentee provisions presents a problem "capable of repetition yet evading review." *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969). This appeal will continue to present a justiciable controversy even if the named appellants are not detained or serving sentences at the time the appeal is argued. *McDonald v. Board of Elections*, 394 U. S. 802, 803 n. 1 (1969); *Goldberg v. Kelly*, 397 U. S. 254, 256 n. 2 (1970).

Conclusion.

Appellants submit that the decision of the New York Court of Appeals upholding the validity of the New York State absentee balloting provisions over appellants' contention that the statutes are repugnant to the United States Constitution fails to apply the standard of judicial review mandated by this Court. Under the appropriate standard the statutory classification cannot

withstand judicial scrutiny. The questions presented by this appeal are substantial and of public importance, and, indeed, the argument for reversal is so compelling that appellants respectfully request a summary reversal of the judgment appealed from.

Respectfully submitted,

RUTH B. ROSENBERG,
DAVID N. KUNKEL,
New York Civil Liberties Union,
c/o One Exchange Street,
Rochester, N. Y. 14614
WILLIAM D. EGGERS,
League of Women Voters,
c/o One Exchange Street,
Rochester, N. Y. 14614
Attorneys for Appellants.

BURT NEUBORNE,
Of Counsel.

APPENDIX A.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF MONROE.

EDWARD F. O'BRIEN, *et al.*,

Petitioners,

against

ALBERT SKINNER, Sheriff of Monroe County and KENNETH POWER and ROBERT NORTHRUP, being the Monroe County Board of Elections,

Respondents.

Article 78 Proceeding under the Election Law.

Judgment directed dismissing the proceeding on the merits.

Appearances:

Ruth B. Rosenberg, William D. Eggers and David N. Kunkel, of Rochester (William D. Eggers, of counsel), attorneys for petitioners.

William J. Stevens, Monroe County Attorney (Michael K. Consedine, of counsel), attorney for respondents.

MEMORANDUM

This is a special proceeding in the nature of mandamus brought on by an order to show cause returnable October 17, 1972 in an Article 78 Proceeding based upon Article 14 of the Election Law. Petitioners, some 72 in number, are all presently inmates of the Monroe County Jail at Rochester, New York, by reason of pend-

ing criminal charges or misdemeanor convictions. They claim to be qualified to register and vote in unspecified election districts of Monroe County but are unable to do so because of their incarceration. Upon the instigation of the League of Women Voters and the American Civil Liberties Union, petitioners have presented their petition, sworn to on October 11, 1972, on behalf of themselves and others similarly situated, whereby they seek an order directing the respondents Sheriff, of Monroe County and the Monroe County Board of Elections to make the necessary arrangements and take the appropriate steps to enable petitioners to register and vote at the forthcoming general election on November 7, 1972.

The suggestion of petitioners that the respondent Sheriff should transport them to their respective polling places for registration and voting in person is too ridiculous to discuss, except to mention this absurd contention in passing, which brings us to the alternative method of registering and voting as an absentee.

The contention of petitioners that they are being unconstitutionally deprived of their rights of franchise cannot be sustained. The Legislature has made adequate provision for absentee registration and absentee voting. Election Law, §153-a sets forth the circumstances under which absentee registration is authorized and the required procedure. It permits such registration of any voter who is ". . . unable to appear personally for registration because he is confined in . . . [an] . . . institution, other than a mental institution because of . . . physical disability . . . ." Since Election Law, §330 requires such provisions to be construed liberally, and because an inmate of a jail is under physical disability to present himself at a polling place or at the central registration office, this court concludes that petitioners are entitled to absentee registration upon complying with the requirements of Election Law, §153-a, provided that

they are not disenfranchised by the provisions of Election Law, §152 and provided that they make due and timely application for such registration.

However, there is no showing that any of these petitioners has made due application. Section 153-a is explicit as to the detailed information to be submitted to the Board of Elections to enable it to make an intelligent decision to determine eligibility for registration. The 72 forms signed by these petitioners and attached to the petition give practically none of such required information. The forms upon which proper applications could have been made to the Board of Elections were available to petitioners, they had ample time to complete and file them, but none of them availed himself of the opportunity. The Secretary of State set October 10, 1972 as the last day for absentee registration (Election Law, §354). The time has now passed within which proper applications could have been made and this court cannot re-write the Election Law.

As to those of petitioners who may be qualified to vote at the forthcoming election because they are already registered, Election Law, §117-a controls. For reasons already stated, the court concludes that such persons are eligible to vote by absentee ballot, except as to such as may have been disenfranchised and provided that each makes due and timely application for an absentee ballot. The forms for such applications, which also require detailed information necessary to enable the Board of Elections to make an intelligent decision as to the eligibility of the applicant to vote are available to petitioners. It does not appear that any of them has made the type of application required. As in the case of their applications for absentee registration, the forms which petitioners have signed and filed with the Board of Elections furnish practically none of the required information.

However, it is not too late for such of these petitioners as may already be registered to make due and timely application for absentee ballots, October 31, 1972 being the last day for the filing of applications for absentee ballots. There is no showing that any of the respondents has obstructed proper application. Should such a situation occur, the courts are open to such petitioners as may feel aggrieved.

Accordingly, judgment is directed dismissing this proceeding on the merits, without prejudice to such of the petitioners as may be qualified to do so, making due and timely applications for absentee ballots, if so advised.

Submit order.

Dated: October 20, 1972

s/ ARTHUR ERVIN BLAUVELT
Justice Supreme Court

APPENDIX B.

718

SUPREME COURT OF THE STATE OF NEW YORK.

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT.

Present:

DelVecchio, J.P., Marsh, Moule, Henry, JJ.

EDWARD F. O'BRIEN, *et al.*,

Appellants-Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County and KENNETH POWER and ROBERT NORTHRUP, being the Monroe County Board of Elections,

Respondents-Appellants.

The above named Edward F. O'Brien, *et al.*, petitioners in this proceeding, having appealed to this Court from a judgment (denominated order) of the Supreme Court, entered in the office of the Clerk of the County of Monroe, on the 24th day of October, 1972, and Albert Skinner, Sheriff, and Kenneth Power and Robert Northrup, being the Monroe County Board of Elections, respondents, having appealed from said judgment, and said appeals having been argued by Mr. David N. Kunkel, of counsel for the appellants-respondents, and by Mr. Michael K. Consedine, of counsel for the respondents-appellants, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously modified by directing respondents Commissioners of Elections to register such of petitioners as shall be found to be qualified and to issue absentee ballots to them, and as so modified the judgment is hereby affirmed, without costs. Memorandum: Petitioners, who are persons incarcerated in the Monroe County Jail awaiting trial because of their inability to make bail or serving sentences on convictions for misdemeanors, indicated their eligibility to register and vote and their desire to do so and filed their applications with the Commissioners of Elections on October 10, 1972 which was the last day for registration.

The Comimssioners of Elections refused to register them. Section 117-a of the Election Law provides for absentee voting where a qualified voter may be unable to appear because of a physical disability. We believe that petitioners, being so confined, are physically disabled from voting and should be permitted to do so by casting absentee ballots.

Enter.

LESTER A. FANNING

Entered: October 27, 1972
LESTER A. FANNING, Clerk.

APPENDIX C.

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

4. No. 501. 72

IN THE MATTER

of

EDWARD F. O'BRIEN, *et al.*,

Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County & ors., being the Monroe County Board of Elections,

Appellants.

SCILEPPI, J.:

Petitioners, seventy-two detainees at the Monroe County Jail awaiting trial on various charges or serving sentences on misdemeanor convictions, by this proceeding seek review of the County Board of Elections' refusal to allow them to register as absentee voters upon the ground that they were not "physically disabled" within the meaning of the applicable provisions of the Election Law; or, in the alternative, to compel the parties respondent to cooperate in undertaking all arrangements otherwise necessary to enable them to vote on November 7th: including, the provision of special polling booths

or other voting facilities and, if necessary, guarded transportation to local polling places.

Special Term granted relief to those petitioners who had personally registered prior to their incarceration and directed that they be allowed to vote by absentee ballot; but, denied similar relief to others who had not so registered, dismissing the petition as to them. On cross appeals, the Appellate Division modified, holding that because of their confinement petitioners were "physically disabled"; hence, at least insofar as they were determined otherwise qualified to vote entitled to cast absentee ballots. Respondents, the County Sheriff and the Board of Elections, prosecute a further appeal to this Court.

We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions and, in view of the attendant difficulties; or, would threaten like hazards embraced by such schema. The question raised, then, resolves itself into simply this: whether confinement to a penal institution constitutes a "physical disability" under Election Law, §§ 117-a and 153-a, thus affording petitioners the occasion to vote by absentee ballot; if not, whether the recognized failure to make such provision deprives them of equal protection of law.

Petitioners seek absentee registration and ballots under Election Law, §§ 117-a and 153-a, providing for absentee voting and registration where a voter is ". . . unable to appear personally . . . [for either purpose] . . . because he is confined at home or in a hospital or institution, other than a mental institution, because of illness or physical disability . . . (Election Law, §§ 117-a [1] & 153-a [1]). Under these provisions, however, a person seeking to qualify by reason of such a disability is further required to submit proof of this fact in the form

of a medical certificate executed by an attending physician or the administrative head of a hospital or institution (Election Law, §117-a [5]; See also Election Law, §153-a). What is required of an applicant, therefore, is that he be medically disabled by reason of some malady or other physical impairment. Under the circumstances, the fact of confinement to a penal institution would not entitled [*sic*] a voter or registrant to avail himself of the absentee provisions.

Nor does the failure to provide these absentee rights deprive the petitioners of their equal protection guarantees. These provisions set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote (cf. *Atkin v. Onondaga Co. Bd. of Elections*, 31 N. Y. 2d 401; *Dunn v. Blumstein*, 405 U. S. 330; see also *Kramer v. Union School Dist.*, 395 U. S. 621, 626-627). Such conditions must, of course, be "necessary to promote a compelling state interest" (*Dunn v. Blumstein*, 405 U. S. 330, *supra; Bullock v. Carter*, 405 U. S. 134, 143; *Atkin v. Onondaga Co. Bd. of Elections*, 30 N. Y. 2d 401, 404-405, *supra; Palla v. Suffolk Co. Bd. of Elections*, 30 N. Y. 2d 36, 49-50).

The underlying right which is the subject of these proceedings is not the right to vote, that right is independently guaranteed, but merely a claimed right to absentee ballots, and in some instances, absentee registration. (*McDonald v. Board of Election*, 394 U. S. 802, 807; *Goosby v. Osser*, 452 F. 2d 39, 40 [3rd Cir., 1971]). And, since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (*McDonald v. Board of Election*, 394 U. S. 802, 809; *Goosby v. Osser*, 452 F. 2d 39, *supra*.) Measured in terms of this less stringent standard, at least one Federal court, on identical facts, has sustained a similar

scheme under Pennsylvania law (*Goosby v. Osser*, 452 F. 2d 39, *supra*).

In the end, petitioners' plaint is directed towards the consequences of their incarceration. In this regard, however, it is significant that they are not alone. Others, including poll watchers assigned outside their voting district, and those confined to mental institutions, to name just two groups who, absent an absentee ballot, would find it well-neigh impossible to vote, are similarly disadvantaged. Perhaps, the statutory scheme should be extended further to include all those so situated. The question has been posed before by a higher source (see *McDonald v. Board of Election*, 394 U. S. 802, 809-810, *supra*); its resolution, nonetheless, is one for the legislature not the courts.

The right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design.

Accordingly, the order appealed from should be reversed and the petition dismissed.

Fuld, Ch. J. (dissenting):

In my view the State Constitution (art. II, §§ 1, 4, 5) guarantees petitioners—some of whom are now incarcerated in the Monroe County Jail awaiting trial while others are serving sentences on convictions for misdemeanors—the right to vote. Accordingly, I would read section 117-a of the Election Law as the Appellate Division has and affirm its order.

BURKE, J. (dissenting):

I concur in Chief Judge Fuld's dissent, and would add merely that, in my opinion, any construction of the Election Law effectively precluding these petitioners from exercising their rights to register and vote is also in violation of the equal protection guarantees of the United States Constitution. As a result of recent media revelations, it is now commonly understood that those confined to our prisons awaiting trial are, for the most part, the politically disconnected and the financially disabled. Individuals more fortunately situated can secure their release either on bail or on their own recognizance. To deny them the right to vote, based upon the condition of incarceration, is to discriminate invideously among those within the same class.

* * *

Order reversed, without costs, and the petition dismissed. Opinion by Scileppi, J. All concur except Fuld, Ch. J., and Burke, J., who dissent and vote to affirm in separate memoranda.

APPENDIX D.

No. 501

COURT OF APPEALS.

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of October in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.
Gearon Kimball, Deputy Clerk.
Remittitur November 3, 1972.

4. No. 501. 72

IN THE MATTER

of

EDWARD F. O'BRIEN, *et al.*,

Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County & ors., being the Monroe County Board of Elections,

Appellants.

BE IT REMEMBERED, That on the 30th day of October in the year of our Lord one thousand nine hundred and seventy-two, Albert Skinner, Sheriff of Monroe County, &ors., being the Monroe County Board of Elections, the appellants in this cause, came here unto the Court of Appeals, by William J. Stevens, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Edward F. O'Brien, *et al.*, the respondents in said cause, afterwards appeared in said Court of Appeals by William D. Eggers, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Michael K. Consedine, of counsel for the appellants, and by Mr. William D. Eggers, of counsel for the respondents and Mr. William J. Kogan, for the Attorney General as *amicus curiae* and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the petition dismissed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

GEARON KIMBALL
Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 3, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

GEARON KIMBALL
Deputy Clerk.

(Seal.)

APPENDIX E.

SUPREME COURT OF THE UNITED STATES.

No. A-484

Application for Stay.

EDWARD F. O'BRIEN, *et al.*

v.

ALBERT SKINNER, Sheriff, Monroe County, New York, *et al.*

[November 6, 1972]

MR. JUSTICE MARSHALL, Circuit Justice.

Appellants, 72 prisoners in County Jail in Monroe County, New York, applied to me in my capacity as a Circuit Justice for a stay of a New York Court of Appeals judgment entered November 3, 1972.

The appellants are either convicted misdemeanants or persons who have been convicted of no crime but are awaiting trial. New York law makes no provision for the disfranchisement of these groups. Nonetheless, appellants allege that they have been prevented from registering to vote because correctional and election officials have refused to provide them with absentee ballots, refused to establish mobile voting and registration equipment at the prison, and refused to transport them to the polls. Appellants argue that this restriction on their right of franchise is not supported by the sort of "compelling state interest" which this Court has in the past

required. See, *e. g., Dunn v. Blumstein,* 405 U. S. 330 (1972). They challenge the constitutionality of the New York statute which permits absentee voting by persons confined to state institutions by reason of physical disability but makes no provision for absentee voting by persons confined to state prisons after misdemeanor convictions or while awaiting trial.

In response, the State relies on this Court's decision in *McDonald v. Board of Election Commissioners,* 394 U. S. 802 (1969). In *McDonald,* we held that, under the circumstances of that case, the mere allegation that Illinois had denied absentee ballots to unsentenced inmates awaiting trial in the Cook County jail did not make out a constitutional claim. I am not persuaded, however, that *McDonald* governs this case. Cf. *Goosby v. Osser,* 452 F. 2d 39 (CA3 1970), cert. granted, 408 U. S. 922 (1972). In *McDonald,* there was "nothing in the record to indicate that the Illinois statutory scheme [had] an impact on appellant's ability to exercise the fundamental right to vote." 394 U. S. at 807. We pointed out that the record was "barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.,* at 808, n. 6. Here, in contrast, it seems clear that the State has rejected alternative means by which appellants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e. g., Harper v. Virginia Board of Elections,* 383 U. S. 667, 670 (1964).

Compelling practical considerations nonetheless lead me to the conclusion that this application must be denied. Appellants waited until the last day of registration before submitting their registration statements to election officials, and they filed this application a scant four days before the election.

Moreover, neither party submitted to me the Court of Appeals opinion denying relief until 4 o'clock this afternoon, and I still do not have before me any written indication as to whether appellants have applied to the state court for a stay or as to the state court's disposition of any such application.

Even if it were possible to arrange for absentee ballots at this late date, election officials can hardly be expected to process the registration statements in the remaining time before the election. It is entirely possible that some of the appellants are disqualified from voting for other reasons or that, while qualified to vote somewhere in the State, they are not qualified to cast ballots in Monroe County. The States are, of course, entitled to a reasonable period within which to investigate the qualifications of voters. See *Dunn v. Blumstein, supra,* at 348.

Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militate against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the case in this posture, I conclude that effective relief cannot be provided at this late date. I must therefore deny the application.

APPENDIX F.

Notice of Appeal to the Supreme Court of the United States.

COURT OF APPEALS,

STATE OF NEW YORK.

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below; LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, MCKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALEY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

vs.

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the Monroe County Board of Elections,

Appellees.

Notice is hereby given that the above-named Appellants hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered in this action on November 3, 1972 which reversed the order of the Appellate Division of the Supreme Court, Fourth Department, entered October 27, 1972, and which affirmed the judgment of the Supreme Court, Monroe County, entered October 14, 1972, dismissing the petition.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

RUTH B. ROSENBERG
Attorney for Appellants
One Exchange Street
Rochester, New York 14603

APPENDIX G.

New York Election Law §153-a.

Absentee registration by voters who are ill or physically disabled, or whose duties, occupation or business require them to be outside the county of residence, or if a resident of the city of New York, outside said city

1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law.

* * * * *

4. Application forms for absentee registration for use pursuant to this section shall be furnished by the boards of election, upon request of the person authorized to register under this section or by any such person's spouse, parent or child; or, if residing with the applicant, by his brother, sister, uncle, aunt, nephew or niece; or by a request in writing, on behalf of the applicant.

* * * * *

Applications by applicants qualified to apply for absentee registration pursuant to the provisions of this section may be filed with the county board of elections after the close of the period of central registration and up to and including the last day of local registration, other than applications which are filed pursuant to the provisions of subdivision six and eight-a of this section. Any application sent by mail in an envelope postmarked prior to midnight of the last day for filing shall be accepted for filing when received.

5. Printed forms of applications to be made by a voter because of illness or physical disability shall contain a statement signed by the voter and a medical certificate printed together on one sheet. Such application shall contain a statement that the voter will be unable to attend before the board of inspectors of his election district on any one of the days which shall be provided for local registration because of being confined at home or in the hospital or institution, other than a mental institution because of his illness or physical disability. Such statement shall contain a provision enabling the applicant to state whether he is confined permanently because of illness or physical disability. The statement of applicant shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement shall subject the applicant to the same penalties as if he had been duly sworn and such provision shall be printed in bold type directly above the signature line on the form of statement furnished by the board of elections.

* * * * *

Such application shall be accompanied by a certificate made by a duly licensed physician or by the medical superintendent or administrative head of a hospital or institution, other than a mental institution, or by a

Christian Science practitioner, having knowledge of the facts and certifying that such applicant is unable to appear personally as required under this section because of his illness or physical disability. Such medical certificate shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing same to the same penalties as if he had been duly sworn and such provision shall be printed in bold type directly above the signature line on the medical certificate form provided by the board of elections. Such medical certificate shall be in substantially the following form, the board of elections to fill in on such form the period of central registration and the days of local registration:

* * * * *

6. Notwithstanding the provisions of subdivision two of section one hundred seventeen-a, an applicant for absentee registration who is confined permanently because of illness or physical disability and unable to appear personally before the board of central registration when said board shall be open for registration or before the board of inspectors of his election district on any of the days which shall be provided for local registration and unable to appear on the day of the next general election, as it appears from his statement and the medical certificate, shall cause to be filed with his county board of elections an application for absentee registration which shall be inclusive of an application for an absentee voter's ballot, commencing with the first day of the period of central registration and up to and including the last day of local registration. Such application shall contain an allegation that the applicant is making an application at the same time for an absentee voter's ballot.

7. The board of elections shall determine whether the illness or physical disability, as set forth in applicant's

statement is of such a nature as to render the applicant unable to appear personally at the board of elections during the period of central registration where the application was filed during such period, as provided in subdivision six of this section, or at the polling place on any of the days provided for local registration.

* * * * *

8. The application to be made by the voter who because of his duties, occupation or business will be required to be outside the county of residence, or if a resident of the city of New York, outside said city, on all of the days of local registration, shall contain an affidavit that the applicant will be unable to attend before the board of inspectors of his election district on all of the days provided by law for local registration because his duties, occupation or business require him to be outside the county or city of New York; such affidavit shall also contain the name and address of the applicant's employer, if not self employed, the nature of the duties, occupation or business requiring him to be outside the county or city of New York and also the date when he expects to return to the county or city of New York. An affidavit of the employer shall also be included in such application which shall contain a statement that the applicant for absentee registration is in his employ, the nature of such applicant's duties, occupation or business, a statement that applicant will be required to be outside the county or city of New York on all of the days provided for local registration, and a statement of the special circumstances on account of which the applicant will be so absent. Such affidavits shall be sworn to before any officer authorized to take oaths. Printed forms of such application shall contain the applicant's affidavit and also the affidavit of his employer together on one sheet.

8-a. Notwithstanding any inconsistent provision of section one hundred seventeen, an applicant for absentee registration who, because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, continuously from the commencement of the period of central registration until and including election day, and who for that reason is unable to appear personally either before the board of central registration when said board shall be open for registration or before the board of inspectors of his election district on any of the days which shall be provided for local registration or on the day of the next general election, as it appears from his affidavit and the affidavit of his employer in connection therewith, shall cause to be filed with his county board of elections an application for absentee registration which shall be inclusive of an application for an absentee voter's ballot, commencing with the first day of the period of central registration and up to and including the last day of local registration. Such application shall contain an allegation that the applicant is making an application at the same time for an absentee voter's ballot.

* * * * *

9. Upon the application of a person whose duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on all of the days of local registration, the board of elections shall determine whether the duties, occupation or business, as set forth in the affidavit, are of a nature ordinarily to require traveling beyond the boundaries of the county or city of New York, and shall determine, if they are found not to be of such a nature, whether the special circumstances, as set forth in the affidavit, are sufficient to permit absentee registration. If found insufficient the application shall be rejected and the applicant notified of such rejection with the reason therefor,

and such determination shall automatically be cause also for the rejection of the application made by the spouse, parent or child accompanying or being with such applicant.

10. Upon receipt of the application for absentee registration provided for by this section, containing the statement or affidavit, whichever the case may be, and of any other statement, affidavit, document or medical certificate required, the board of elections shall determine upon such inquiry as it deems proper whether the applicant has answered all the questions required and contained in the application and whether the applicant is legally qualified to register in the election district stated in his application as the one in which he resides, and if it finds he is not qualified shall reject the application and shall notify the applicant of such rejection and give the reason therefor.

11. Upon receipt of such application if it appears that the applicant is a new voter and that he has not furnished proof of literacy as provided in section one hundred sixty-eight, the board of elections shall thereupon notify him of the need of producing such proof and shall furnish him with the necessary forms referred to in such section for execution and filing in lieu of producing the documents referred to in such section. The board shall also notify the board of regents of the state of New York in charge of the giving of literacy tests as required by such section and an arrangement shall be made for the giving of a literacy test to such applicant and for the issuance of a certificate of literacy under the rules and regulations of such board of regents.

* * * * *

12. An affidavit or a signed statement by any officer or employee of the board of elections or any police officer, sheriff or deputy sheriff, or a special deputy attorney-

general appointed pursuant to the executive law, that he visited the premises claimed by the applicant as his residence and that he interrogated an inmate, housedweller, keeper, caretaker, owner, proprietor or landlord thereof or therein as to such applicant's residence therein or thereat, and that he was informed by one or more such persons, naming them, that they knew the persons residing upon such premises and that the applicant did not reside upon such premises, or that the applicant, if applying for absentee registration because of illness or physical disability, was not in fact so confined because of such illness or physical disability at home or in the hospital or institution, other than a mental institution, as set forth in his application; or in the case of an applicant for absentee registration who is permanently confined because of illness or physical disability, that the nature of the illness or disability of such an applicant was or is not of such seriousness as to have rendered or will render the applicant unable to appear personally at the board of elections during the period of central registration or at the polling place on any of the days provided for local registration or on the day of the next general election where the application was filed during the period of central registration as provided in subdivision six of this section, shall be sufficient authority for a determination by the board that the applicant is not entitled to absentee registration; but this provision shall not preclude the board from making such determination as the result of other inquiry.

If the board shall determine that the applicant is not entitled to absentee registration it shall notify the applicant and give him the reason for such rejection.

13. If the application for absentee registration of an applicant who is permanently confined at his home or in the hospital or other institution because of illness

or physical disability shall contain all the information required and the board of central registration is satisfied therewith, and if the board shall find that the applicant is a qualified voter of the election district containing his residence as stated in his statement, and the medical certificate, and any other document required to be filed with the application, are sufficient and such board is satisfied that the applicant is and will be so permanently confined and will not be able to leave home or the hospital or institution, not only during the period of central registration and during the period of local registration but also on the day of the next general election, the board of central registration, as soon as practicable after it shall have determined his right thereto, shall transfer all information on such application to the register of voters or on the appropriate registration records.

* * * * *

18. Notwithstanding the entry by the board of elections or the board of central registration or the inspectors of election in the registers or registration records of the required information contained on an application for absentee registration, such entry shall not preclude the board of elections from subsequently rejecting the application if it is not satisfied that the applicant is entitled to absentee registration as provided by section one hundred fifty-three-a. The board of elections, whenever it is not satisfied from an examination of an application for absentee registration that the applicant is entitled to such absentee registration, shall order an investigation through any officer or employee of the board of elections, police officer, sheriff or deputy sheriff, or a special deputy attorney-general appointed pursuant to the executive law.

* * * * *

APPENDIX H.

New York Election Law §117-a.

Application for ballots by absentee voters who may be unable to appear personally at the polling places because of illness or physical disability

1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; but the right to apply for an absentee ballot as provided in this section shall not extend to any person having the right to apply for an absentee ballot under section one hundred seventeen on account of unavoidable absence from his residence because he is an inmate of a veterans' bureau hospital.

2. A qualified voter desiring to vote at such election for the reasons specified in subdivision one of this section shall sign a statement setting forth the information as hereinafter in this section required, and mail or have delivered such statement to the board of elections not earlier than the thirtieth and not later than the seventh day before such election. Such statement shall set forth (a) his name and residence address, including street and number, if any, or town and rural delivery route, if any; (b) that he is a qualified voter of the election district in which he resides; (c) in case he voted at the preceding general election, the election district, assembly district if in the city of New York, town or city, county and state where he so voted; and (d) that he was advised by his physician, medical superintendent, administrative head of the hospital or institution, or Christian Science

practitioner, whichever is the case, that he will be unable to appear personally at the polling place of the election district in which he is a qualified voter on the day of the next general election because of his illness or physical disability and confinement either at home, or in the hospital or institution, other than a mental institution. Such statement shall be accepted for all purposes as the equivalent of an affidavit, and if false shall subject the applicant to the same penalties as if he had been duly sworn, and such provision shall be printed in bold type directly above the signature line on the form of statement furnished by the board of elections.

* * * * *

3. Such statement, if made by a voter who resides in an election district in which personal registration is required shall state that the applicant has registered, giving the date of such registration and his election district. If made by a voter who resides in an election district in which personal registration is not required, it shall state that he has nevertheless registered personally; or that he is not required to register personally and has not registered and does not expect to register personally; in such cases, if the board of elections finds that the applicant is a qualified voter of the election district and entitled to an absentee ballot under this section, the board of elections or the appropriate board of inspectors of election at the direction of the board of elections, shall cause his name to be placed on the register if it is not already thereon. Such statement, if made by a voter who resides in an election district in a county in which permanent personal registration is in effect shall state that applicant is registered.

* * * * *

5. A qualified voter making an application to vote as an absentee voter as provided in this section shall at the same time submit proof of his inability to appear

personally at the polling place on the day of the next general election because of such illness or physical disability. Such proof shall be in the form of a certificate made by a duly licensed physician or by the medical superintendent or administrative head of a hospital or institution, other than a mental institution, or by a Christian Science practitioner having knowledge of the facts and certifying that such applicant is unable to appear on the day of the next general election because of the applicant's illness or physical disability. Where the applicant is unable to sign his name to the application because of illness or physical disability, the medical certificate shall certify such fact. Such certificate shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement shall subject the person signing same to the same penalties as if he had been duly sworn, and such provision shall be printed in bold type directly above the signature line on the medical certificate form furnished by the board of elections. Such medical certificate shall be in substantially the following form:

* * * * *

6. Printed forms containing the application for the absentee ballot and the medical certificate, both contained on one sheet, in accordance with the requirements of this section shall be provided by the board of elections and shall be available at the board of elections and shall also be distributed in the same manner and subject to the same provisions of law as govern the distribution of applications for absentee ballots under section one hundred seventeen of this chapter.

Application forms for absentee ballots for use pursuant to this section, shall be furnished by the board of elections, upon request of the person authorized to vote under this section or by any such person's spouse, parent or child; or, if residing with the applicant, by his brother, sister, uncle, aunt, nephew or niece.

(72-D)

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1058

EDWARD F. O'BRIEN *et al.*,
Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
The Capitol
Albany, New York 12224
Telephone: (518) 474-8160

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Questions Presented

1. Does New York State Election Law, § 117-a deny appellants equal protection of the law insofar as section 117-a provides for absentee ballots for persons who are unable to appear personally at a polling place of the election district in which they are qualified to vote because of illness or physical disability but does not provide for absentee voting by appellants who are incarcerated in a county jail and who are either awaiting trial or are convicted misdemeanants?

2. Does New York State Election Law, § 153-a deny appellants equal protection of the law insofar as section 153-a provides for absentee voter registration by persons who are unable to appear personally for registration because of confinement at home or in a hospital or institution because of illness or physical disability but does not provide for absentee registration by appellants who are incarcerated in a county jail and who are either awaiting trial or are convicted misdemeanants?

The New York Court of Appeals answered each question in the negative (*O'Brien* v. *Skinner*, 31 NY2d 317, 319).

Constitution and Statutes Involved

New York State Constitution, Article II, § 2:

> "The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the City of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

New York State Election Law, § 117-a(1) provides:

> "A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; * * *."

New York State Election Law, § 153(1) (subject matter formerly contained in Election Law, § 153-a which was repealed by Laws of 1972, ch. 962, eff. Jan. 1, 1973):

> "A person who is unable to appear personally for registration on all of the days for local registration (a) because he is confined to home or in a hospital or institution because of illness or physical disability or (b) because his duties, occupation or business require him to be outside the county of residence, or if a resident of the City of New York, outside said city, on such days, may be registered in the manner provided by this section."

Statement

The appellants were all detainees in the Monroe County jail when they instituted this proceeding to obtain absentee registration and ballots for the 1972 General Election. The appellants included persons who were convicted misdemeanants as well as those who were incarcerated while awaiting trial. The Monroe County election officials declined to establish a polling place in the jail or to permit absentee registration and balloting for the appellants upon the ground that there was no statutory authorization therefor.

Neither the State of New York nor any official thereof is a party to this proceeding. The State was granted permission to appear *amicus curiae* in the argument of the appeal in the New York Court of Appeals.

The New York Court of Appeals (*Matter of O'Brien* v. *Skinner*, 31 N Y 2d 317), disposed of appellants' attempt to avail themselves of the provisions of New York State Election Law, §§ 117-a and 153-a (quoted *supra*) by holding that these sections required that the applicant "be medically disabled by reason of some malady or other physical impairment. Under the circumstances, the fact of confinement to a penal institution would not entitle a voter or registrant to avail himself of the absentee provisions." (*id.* at p. 319).

Turning to the constitutional issue which was raised, the Court noted that sections 117-a and 153-a "set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote" (*id.* at p. 320). The Court further stated that the statutes in question do not have a direct impact on the appellants' right to vote but rather on the right to absentee ballots. Consequently, the Court applied the "reasonableness" test (citing *McDonald* v. *Board of Election*, 394 U. S. 802), and concluded:

> "Under the circumstances, and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them." (31 N Y 2d at pp. 320, 321)

ARGUMENT

The New York State Court of Appeals decision in accord with the law previously established by this Court, properly held that there has been no denial of appellants' constitutional rights.

A. The appeal should be dismissed because it presents no substantial Federal question.

The questions raised by the appellants have clearly been foreclosed by the decisions of this Court.

The argument that a polling place be established within the county jail is not a viable one in view of this Court's decisions that the States have the right to require that persons presenting themselves to vote be *bona fide* residents of the community. (*Carrington* v. *Rash,* 380 U. S. 89, 13 L. Ed. 2d 675; *Dunn* v. *Blumstein,* 405 U. S. 330; *Evans* v. *Cornman,* 398 U. S. 419.) It is clear that the requisite intent to establish a bona fide residence in a prison simply cannot exist.[1]

In *McDonald* v. *Board of Election* (394 U. S. 802), the appellants were unsentenced inmates in the Cook County jail. They were unable to vote by absentee ballot because there was no Illinois statutory provision therefor. The Illinois Statute did provide for absentee ballots for persons absent from their county of residence, those physically incapacitated and those whose religious observance or election duties precluded their attendance at their polling places.

---

[1] New York State Election Law § 151(a) states that "For the purpose of registering and voting no person shall be deemed to have gained or lost a residence * * * while confined in any public prison * * *."

In the instant appeal, the appellants are inmates of the Monroe County jail, either awaiting trial or as convicted misdemeanants. In New York State, persons who will be unavoidably absent from the county of residence on the occurrence of a general election or who are physically disabled on Election Day, may register and vote absentee (Election Law, §§ 117, 117-a and 153).

In *McDonald,* as in the instant appeal, there was not any statutory prohibition denying appellants the right to vote.[2] This is to be contrasted with *Goosby* v. *Osser* (____ U. S. ____, 41 L W 4167, [January 17, 1973]), in which the opinion of this Court (BRENNAN, J.) noted that "the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes 'persons confined in a penal institution' from voting by absentee ballot" and because of the local election officials' refusal to provide alternative means for voting (41 L W 4170). The opinion in *Goosby* hastened to add that although *Goosby* was remanded for a hearing before a three-judge district court because of "significant differences" between the Illinois and Pennsylvania statutory provisions this Court did not decide or intimate any view on the merits.

In contrast, the New York statutes herein and the Illinois election statutes in *McDonald,* are almost identical as are the underlying facts in each case. There is no affirmative exclusion from voting. As was stated in *McDonald* (*supra* at p. 807): "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." Therefore, this appeal presents no substantial Federal question and should be dismissed.

---

[2] New York State Election Law, § 152 excludes convicted *felons* from the suffrage but not misdemeanants.

B. The New York Court of Appeals correctly held that there was no denial of appellants' constitutional rights.

The Court of Appeals properly applied the less stringent "reasonableness" test in this case since the statutes in question do not have a direct impact on the appellants' right to vote and "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review" (*Bullock* v. *Carter,* 405 U. S. 134, 143, 31 L. Ed. 2d 92; see also *McDonald* v. *Board of Election,* 394 U. S. 802, 807; *Fidell* v. *Board of Elections,* 343 F. Supp. 913 affd. ____ U. S. ____ 41 LW 3245 [11-7-72] *Rosario* v. *Rockefeller,* ____ U. S. ____, 41 LW 4401).

The Court of Appeals noted that rather than denying appellants the right to vote, the statutes in question represent remedial legislation and should not have been rendered void merely because they do not encompass all possible categories of voters (*Matter of O'Brien* v. *Skinner,* 31 N Y 2d 317, 320; [*cf. McDonald, supra,* at p. 811]; *Fidell* v. *Board of Elections, supra*).

The persuasive and compelling authority of *McDonald* v. *Board of Election* (394 U. S. 802), left the Court of Appeals no alternative but to dismiss the petition herein and its order should be affirmed.

CONCLUSION

The Court should grant the motion to dismiss the appeal or to affirm the order of the Court of Appeals.

Dated: April 4, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
The Capitol
Albany, New York 12224
Telephone: (518) 474-8160

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General

of Counsel

72-1058

In The

Supreme Court of the United States

October Term, 1972

No. 1058

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, Jr., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, McKINLEY LUNDY, Jr., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, Sr., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, Jr., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, et al., being the MONROE COUNTY BOARD OF ELECTIONS,

Appellees.

On Appeal From The Court of Appeals of The State of New York

MOTION TO DISMISS

WILLIAM J. STEVENS
Attorney for Appellees
MICHAEL K. CONSEDINE, *of Counsel*
307 County Office Building
Rochester, New York 14614

Daily Record Corporation
Rochester, New York
(10953)

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In The

Supreme Court of the United States

October Term, 1972

No. 1058

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, Jr., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, McKINLEY LUNDY, Jr., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, Sr., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, Jr., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, et al., being the MONROE COUNTY BOARD OF ELECTIONS,

Appellees.

On Appeal From The Court of Appeals of The State of New York

MOTION TO DISMISS

Jurisdictional Statement

The paragraph entitled *Jurisdictional Statement* of the Appellants is substantially correct except the Appellees feel there is no substantial Federal question in this matter.

Opinions Below

The paragraph entitled *Opinions Below* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Jurisdiction

The paragraph entitled *Jurisdiction* in the *Jurisdictional Statement* of the Appellants is substantially correct except that the Appellees feel that the New York Election Law, §§ 153-a and 117-a, are not repugnant to the Constitution of the United States.

The Statutes Involved

The paragraph entitled *The Statutes Involved* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Questions Presented

The paragraph entitled *Questions Presented* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Statement

The *Statement* in the *Jurisdictional Statement* of the Appellants is substantially correct except they fail to indicate that the seventy-two named prisoners in the Monroe County Jail were solicited by the League of Women Voters and asked to register and vote by the circulation of a form to the Jail population. (Exhibit A)

MOTION TO DISMISS

The Court should dismiss this case in that it has no jurisdiction because there is no substantial Federal question. There is no substantial Federal question because the attack upon

the statutes in question is essentially fictitious. *Bailey v. Paterson.* 369 U.S. 31, 33; 883 S. Ct. 549, 556; 7 L. ed. 2d, 512 (1962) and is obviously without merit. *Ex parte Poresky.* 290 U.S. 30, 32; 54 S. Ct. 3.

The Appellant's claim is unsound to the above reasons in that previous decisions of this Court foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. *Ex parte Poresky,* supra 290 U.S. at 32, 54 S. Ct. at 4.

The questions that are presented in this case have been decided by this Court in *McDonald v. Board of Election Commissioners.* 394 U.S. 802 (1969). In this case an Illinois statute provided that persons physically incapacitated were allowed to register and vote by absentee method. The Illinois statute, although more artfully drawn than the New York statute, was substantially similar to the sections of the New York Election Law under attack by the Appellants. This Court upheld the decision of the Lower Court in dismissing an action brought by prisoners awaiting trial or serving sentences as misdemeanants on the ground that the Illinois statute did not provide for the registration and voting of such persons. This Court upheld the decision of the Lower Court in that

1. There was nothing to show that jail inmates were absolutely prohibited from exercising their franchise to vote;

2. Failure to include prisoners under the statute is not arbitrary as other classes were also excluded;

3. Prisoners are not physically disabled under the meaning of the Illinois statute;

4. The Court refers to the Illinois scheme as "remedial" (Pages 809, 811) and upheld the statute by applying the principle that remedial legislation is not invalid merely because it does not cover all classes of persons who might benefit from it. (See also *Fidel v. Board of Elections.* 343 F. Supp. 913, affd. 41 Law Week 3245 [1973].)

The Appellants rely on *Goosby v. Osser.* 93 S. Ct. 854 (1973) in trying to establish jurisdiction in the instant case. In *Goosby* this Court required the convening of a three judge Court to determine whether a Pennsylvania statute specifically precluded prisoners unable to make bail or held on non-bailable offenses from voting or registering as in this matter there was a substantial Federal question. This case is clearly distinguishable from the instant case which fits the facts of *McDonald.*

The New York statutes do not provide absolute prohibition from voting or registering as the Pennsylvania statute does. Indeed the New York statutes in question can be treated in the same way the Illinois statutes were treated in *McDonald* as reform measures which serve to extend the franchise to those who had previously been unable to exercise it and thus are remedial. These statutes should not be invalidated merely because the statute does not cover all classes of persons who might benefit.

The principle in the instant case was adopted by the New York State Court of Appeals and the rationale is contained in the decision of Judge Scileppi which appears on Page 26 of the *Jurisdictional Statement* of the Appellants. Judge Scileppi felt that the provisions of the New York statutes have no direct impact on the petitioner's right to vote but merely is a claimed right to absentee ballots and registration and as these provisions have no direct impact on the petitioner's right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. The New York Court of Appeals felt that it was for the Legislature, not the Courts to extend further those to be included under the statute.

As this Court has decided the matter in question in *McDonald,* there is no room for the inference that the question sought to be raised can be the subject of controversy as *McDonald* forecloses the subject.

CONCLUSION

The attack upon the statutes in question is without merit and should be dismissed.

Respectfully submitted,

WILLIAM J. STEVENS
Attorney for Appellees
MICHAEL K. CONSEDINE, *of Counsel*
307 County Office Building
Rochester, New York 14614

EXHIBIT A

October 6, 1972

To: Prisoners awaiting trial and
Prisoners convicted of crimes other than felonies
From: League of Women Voters and American Civil Liberties Union

You have NOT lost your RIGHT to VOTE or your RIGHT to REGISTER because you are in jail.

No one has ever voted from jail here before. No system has been set up to handle it.

But if YOU want to register and/or vote, we'll go to bat for you. We'll see if we can get rid of the stumbling blocks to your voting.

We need your name, home address, and signature NOW. Registration closes Tuesday, October 10.

To vote here you must be at least 18 years old, a citizen and a resident of Monroe County AND YOU MUST BE REGISTERED.

If you want to vote, fill out the form below.

. . . . . .

Yes, I want to register. X

Check one or both

Yes, I want to vote. X

Name: /s/ Louis P. Giorgione
(please print)
Home address: 173 Kuhn Rd.
(street)
Rochester, N.Y. Zip 14612
(town or city)
Signature: /s/ Louis P. Giorgione

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1058.

EDWARD F. O'BRIEN, *et al.*,
Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

WILLIAM D. EGGERS,
DAVID N. KUNKEL,
RUTH B. ROSENBERG,
New York Civil Liberties Union,
c/o One Lincoln First Tower,
Rochester, N. Y. 14603
Attorneys for Appellants.

Of Counsel:
RONALD L. BROWN,
Rochester, N. Y.;
BURT NEUBORNE,
MELVIN L. WULF,
New York, N. Y.

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In The

Supreme Court of the United States

October Term 1972.

No. 72-1058.

Edward F. O'Brien, *et al.*,

Appellants,

v.

Albert Skinner, Sheriff, Monroe County, *et al.*,

Appellees.

Appeal From The Court of Appeals of the State of New York.

BRIEF FOR APPELLANTS.

Opinions Below.

The opinion of the New York Court of Appeals (J.S. 24-28) is reported at 31 N. Y. 2d 317, 338 N. Y. Supp. 2d 890, 391 N. E. 2d 134 (1972). The opinion of the Appellate Division of the Supreme Court, Fourth Department (J.S. 22-23) is reported at 40 A. D. 2d 942, 337 N. Y. Supp. 2d 700 (1972). The opinion of Supreme Court, Monroe County (Blauvelt, J.) (J.S. 18-21) has not been reported.

Jurisdiction.

The judgment of the New York Court of Appeals was entered November 3, 1972 (J.S. 29-31). Notice of Ap-

peal was served November 3, 1972 and filed November 9, 1972 (J.S. 35-36). The appeal was docketed January 31, 1973. Probable jurisdiction was noted May 7, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2). *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282 (1921).

Questions Presented.

The Court of Appeals of New York has denied all requests by pretrial detainees and misdemeanants for a means to vote in person and has construed the New York absentee voting provisions (N. Y. Election Law §§ 117 (6), 117-a, 153-a) as barring persons confined in prison in the county of their legal residence from voting by absentee means. The absentee provisions extend the right to vote to persons confined because of a medical disability and to numerous persons absent from the county of their legal residence, presumably including persons confined in a prison located outside the county of their legal residence. The questions presented are:

1. Whether this unequal treatment is repugnant to the Equal Protection Clause of the Fourteenth Amendment in the absence of a state interest of such overriding importance that the right to vote must give way.

2. Whether the absolute denial of a means by which pretrial detainees and misdemeanants may vote violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment as an impermissible consequence of their state-imposed confinement.

Statutes Involved.

The pertinent parts of N. Y. Election Law §§ 153-a and 117-a (McKinney Supp. 1972) are printed at J.S.

37-47. The pertinent parts of N. Y. Election Law § 117 (McKinney Supp. 1972) are printed as an appendix to this brief.

Statement of the Case.

The operation of New York's statutory scheme regulating absentee participation in the electoral process.

New York has provided that, when qualified voters are unable to be physically present at the polls, they may nevertheless participate in the electoral process pursuant to a system of absentee registration and absentee voting. In order to qualify for absentee participation in the electoral process in New York, otherwise qualified voters must demonstrate either:

(1) that they are unable to appear personally at the polls because of confinement at home or in a hospital or institution (other than a mental institution) because of illness or physical disability;[1] or

(2) that they are unable to appear personally for registration because their duties, occupation or business require them to be outside the county of their residence,[2] or that they expect in good faith to be absent from the county of their residence by reason of federal service, education, duties, occupation, business or vacation.[3]

Persons seeking absentee participation in the electoral process because of illness or physical disability must

[1]N. Y. Election Law, §§153-a(1); 117-a(1) (McKinney Supp. 1972).

[2]N. Y. Election Law, §153-a(1) (McKinney Supp. 1972).

[3]N. Y. Election Law, §117(6) (McKinney Supp. 1972).

present a medical certificate attesting to their physical inability to register or to vote in person.

Persons seeking absentee participation in the electoral process because their "duties, occupation or business" require them to be outside their county of residence must submit a sworn affidavit describing the facts which will cause their absence.[4]

Thus, New York has provided a comprehensive and effective scheme to insure that otherwise qualified voters retain the ability to vote despite their inability to appear at the polls. Unfortunately, however, qualified voters who cannot physically appear at the polls because they are confined to penal institutions awaiting trial or serving a misdemeanor sentence are excluded from New York's statutory scheme as a result of the construction placed on the statute by the New York Court of Appeals in this action. That court reasoned that confinement to a penal institution did not constitute a "physical disability" under Election Law, §§117-a and 153-a, because the statute required a *medical* certificate attesting to the inability of the voter to appear personally. The issue posed by this case is whether New York may single out this "disfavored class" of otherwise qualified voters and deny them access to the ballot.

Statement of Facts.

Appellants are 72 otherwise qualified voters who, during the fall of 1972, were confined to the Monroe County

[4]Since appellants are confined in Monroe County—the county of their residence—they were not permitted to apply for absentee participation under this provision. Presumably, those inmates incarcerated in prisons outside the county of their residence would qualify for absentee ballots under the New York statute.

Jail as pre-trial detainees unable to post bond or as misdemeanants serving sentences for minor offenses (A. 11a).

Commencing in August, 1972, the League of Women Voters ("the League"), acting on behalf of appellants, repeatedly sought to evolve a procedure which would permit appellants to participate in the electoral process (A. 5a, 18a-23a).

First the League unsuccessfully sought to persuade the County Sheriff and the Monroe County Board of Elections to establish a mobile voter registration unit at the County Jail pursuant to a program of mobile registration under way throughout New York State[5] (A. 17a-18a).

Second, when its request for a mobile registration unit was denied, the League unsuccessfully urged that appellants be physically transported, under guard, to an appropriate polling place for registration and voting (A. 22a-23a).

Third, the League—customarily assists qualified voters in obtaining absentee ballots—requested the Commissioners of Election for Monroe County ("Commissioners") to provide appellants with application forms for absentee registration and voting (A. 20a). The Commissioners refused on the grounds that incarceration in a penal institution did not constitute a physical disability within the meaning of New York absentee registration and ballot laws (A. 20a).

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[5]New York's mobile registration process is described in *Bishop v. Lomenzo*, F. Supp. (E.D.N.Y. 1972). The League was successful in establishing a mobile registration unit at the Erie County Jail in Buffalo.

Finally, the League prepared and distributed to appellants application forms on which each appellant recited his residence and his desire to register[6] and vote (A. 21a-22a; A. 25a-28a). The Sheriff's department assisted in distributing and collecting these application forms[7] (A. 22a). The League thereupon delivered the applications to the Commissioners on October 10, 1972, the last day for registration (22a).

In spite of these applications, the Commissioners adhered to their position, first, that they were under no duty to permit appellants to register or to vote in person, and, second, that appellants did not qualify for absentee participation in the electoral process.

On October 11, 1972, appellants commenced a proceeding[8] seeking an order directing the Sheriff and the Commissioners to provide means for registration and voting in person, either at the jail or at the established places of registration and voting, or, in the alternative, directing the Commissioners to permit appellants to file applications for absentee registration and balloting and to complete such registration and to provide such ballots to those appellants found to be otherwise eligible to vote

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[6]Five appellants had been previously registered in Monroe County and sought only absentee ballots.

[7]The Sheriff's assistant informally indicated that his department had no objection to permitting absentee registration and voting forms to reach prisoners qualified to vote (A. 22a-23a).

[8]The proceeding was brought as a "summary proceeding" authorized by New York Election Law, §331; N. Y. CPLR 401 *et seq.*, and N. Y. CPLR 7801 *et seq.* The procedure is akin to a motion for summary judgment with an immediate trial of disputed factual issues. N. Y. CPLR 409(b) (McKinney, 1964); 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶409.03 (1972 Supp.); 22 Carmody-Wait 2d, N. Y. Prac. §137:2 (1966).

(A. 5a-8a, 11a-16a). In their verified petition and supporting affidavit, appellants alleged that (a) they had legal residences in Monroe County; (b) were eligible to vote;[9] (c) were confined in Monroe County Jail awaiting trial and unable to post bail or serving sentences imposed following misdemeanor convictions; and (d) had exhausted administrative channels of relief that would permit registration and balloting in person or by absentee means (A. 12a-13a). As an alternative to their plenary requests for relief under state law, appellants asserted that, if the absentee provisions were construed to exclude them, and if they were absolutely unable to register and vote in person, those provisions were invalid under the Fourteenth Amendment (A. 13a, 21a).

Although appellees initially made a general denial of the matters alleged in the petition (A. 29a), they subsequently conceded the material facts and have relied exclusively upon the contention that appellants' requests for absentee voting and other forms of relief were properly denied because state law imposed no duty on appellees to provide any of the means of voting proposed by appellants.

The New York Supreme Court (Monroe County) and the Appellate Division, Fourth Department, of the Supreme Court construed the New York absentee registration and balloting provisions to apply to appellants since they were "unable to appear because of physical disability." 40 A. D. 2d 942. On November 3, 1972, the New York Court of Appeals reversed that determination in an opinion concurred in by five of the seven judges.

[9]Counsel for appellees advised the trial court that he was informed that some of the named appellants had felony convictions. He therefore properly reserved the right to have the Board of Elections review the elegibility of appellants on a case by case basis if a means of voting were to be provided.

The majority of the Court of Appeals "reject[ed] out of hand" all methods of registration and voting in person and construed the absentee provisions of the New York Election Law to apply only to persons "medically disabled by reason of some malady or other physical impairment," but not to persons confined in a penal institution. 31 N. Y. 2d at 319. The Court of Appeals further held that the absentee statutes, as so construed and applied, were not repugnant to the Fourteenth Amendment because "these handicaps * * * are functions of attendant impracticalities or contigencies, not legal design." 31 N. Y. 2d at 321. Chief Judge Fuld dissented on the grounds that the Election Law could and should be construed to permit appellants to vote by absentee means. Judge Burke concurred in Chief Fuld's dissent and added that "any construction of the Election Law effectively precluding [appellants] from exercising their rights to register and vote is also a violation of the equal protection guarantees of the United States Constitution."

Appellants filed a notice of appeal, unsuccessfully sought a stay from Judge Scileppi of the New York Court of Appeals, and on November 4, 1972, filed an application with Mr. Justice Marshall for provisional relief that would protect their right to vote pending appeal. On November 6, 1972, Mr. Justice Marshall denied their application on the grounds that "effective relief cannot be provided at this late date." 409 U. S. 1240, 1242 (1972). Probable jurisdiction was noted on May 7, 1973.[10]

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[10]The questions raised are not moot even though the election has been held and the named appellants are no longer confined in jail. *Goosby v. Osser*, 409 U. S. 512, 514 n. 2 (1973); *Rosario v. Rockefeller*, U. S. 36 L. Ed. 2d 1, 6 n. 5 (1973); *McDonald v. Board of Elections*, 394 U. S. 802, 803 n. 1 (1969). See Jurisdictional Statement, pp. 15-16.

Summary of Argument.

1. New York may not absolutely disenfranchise appellants while it selectively extends the franchise to other qualified voters similarly unable to appear in person.

It is well established that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein,* 405 U. S. 330, 336 (1972). Because New York has refused all of appellants' requests for a means of voting in person, the statutory classifications that further deny them the right to vote by absentee means, while granting the right to vote to other qualified voters confined and unable to appear in person, are repugnant to the Fourteenth Amendment unless the classifications advance a compelling state interest by the least drastic means. Compare *Goosby v. Osser,* 409 U. S. 512 (1973), with *McDonald v. Board of Elections,* 394 U. S. 802, 807-08 (1969). No such compelling state interest has ever been suggested.

2. New York's absentee voting provisions are unconstitutional under any standard of review.

This Court has ruled that even those restrictions on the franchise which fall short of an absolute prohibition may be "so severe as to constitute an unconstitutionally onerous burden on the * * * exercise of the franchise." *Rosario v. Rockefeller,* U. S. , 36 L. Ed. 2d 1, 6-7 (1973). New York's statutory scheme discriminates against appellants on grounds that are wholly arbitrary. The statutory classification between qualified voters medically disabled and qualified voters judicially disabled is both unrelated to whether the voters in question are able to appear in person and unrelated to any reasonable

state interest of sufficient importance to override the right to vote. The state justifications found sufficient in *McDonald v. Board of Elections*, 394 U. S. 802, are inapplicable when appellants are denied all means of voting in person. Therefore, the discrimination against appellants is repugnant to the Fourteenth Amendment under any standard of review.

3. New York has not demonstrated that appellants' confinement necessarily precludes voting by absentee means or by paper ballot; accordingly, that confinement does not justify the compromise of the fundamental right to vote.

It is now familiar law that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied 325 U. S. 887 (1945); see, also, *Johnson v. Avery*, 393 U. S. 483, 486 (1969). The New York court in this proceeding has expressly acknowledged that New York law does not take the franchise from pretrial detainees and misdemeanants. The necessary implications of state-imposed confinement do not compromise the right to vote, because that right may be protected by absentee means or by paper ballots and ballot boxes in prison. *Love v. Hughes*, Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972). Prison officials are fully competent to protect this fundamental right to vote in the same manner that they protect prisoners' rights to practice their religion, use postal facilities, obtain health care, and confer with counsel.

4. New York has imposed an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

Since *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966), this Court has absolutely forbidden the states from conditioning access to the ballot upon the payment of any "tax." In New York, persons awaiting trial who are financially able to post bond are freely permitted to vote, while persons identically situated, who are financially unable to post bond, are denied access to the franchise. Such a "squalid discrimination" based solely upon wealth is unconstitutional.

ARGUMENT.

I.

New York may not absolutely disenfranchise appellants while it selectively extends the franchise to other qualified voters similarly unable to appear in person.

A. The classifications in the absentee voting provisions are unconstitutional unless they are necessary to advance a compelling state interest.

A long line of decisions by this Court establishes beyond dispute that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972); compare *Goosby v. Osser*, 409 U. S. 512 (1973), with *McDonald v. Board of Elections*, 394 U. S. 802, 807-08 (1969). See *Rosario v. Rockefeller*, U. S. , 36 L. Ed. 2d 1, 6 (1973). The right to equal treatment in the voting process is a funda-

mental, personal right, a right essential to citizenship in a free and democratic society. *Dunn v. Blumstein,* 405 U. S. 330, 336; *Reynolds v. Sims,* 377 U. S. 533, 562 (1964). As the Court observed in *San Antonio Independent School District v. Rodriguez,* U. S. , 36 L. Ed. 2d 16, 43, n. 74 (1973), "[t]he constitutional underpinning of the right to equal treatment in the voting process can no longer be doubted * * *." Although a denial of the right to vote is always taken seriously, it is taken more seriously when, as here, a state discriminates against a disfavored class, a class both "politically disconnected and financially disabled." *O'Brien v. Skinner,* 31 N. Y. 2d at 331 [Burke, J., dissenting]; *Harper v. Virginia Board of Elections,* 383 U. S. 663 (1964); *Bullock v. Carter,* 405 U. S. 134 (1972); cf. *Williams v. Illinois,* 394 U. S. 235, 241 (1970).

By applying these principles this Court has struck down state statutes which, as Mr. Justice Stewart observed in *Rosario v. Rockefeller,* 36 L. Ed. 2d at 6, "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." E. g., *Carrington v. Rash,* 380 U. S. 89 (1965); *Kramer v. Union Free School District No. 15,* 395 U. S. 621 (1969); *Cipriano v. City of Houma,* 395 U. S. 701 (1969); *Evans v. Cornman,* 398 U. S. 419 (1970); *City of Phoenix v. Kolodziejski,* 399 U. S. 204 (1970); *Dunn v. Blumstein,* 405 U. S. 330 (1972). Thus, it is firmly established that a state may not absolutely preclude a class of citizens from exercising the franchise unless it can demonstrate a competing right of such substantial and overriding importance that the right to vote must necessarily give way.

This Court has articulated three tests for the judicial scrutiny of a state's claim of sufficient justification for

the invasion of a fundamental right: (1) the state's goals must be of compelling importance; (2) its means must be closely related to those goals and may not unnecessarily burden or restrict the fundamental right; and (3) the state's claim must involve an element of necessity, not mere speculation about possible evils to which the classifications may be related. *Dunn v. Blumstein*, 405 U. S. at 343; *Bullock v. Carter*, 405 U. S. at 145; *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 101, n. 8 (1972). It is against these tests that New York's interests must be measured.

B. Appellants have been disenfranchised under a statutory classification that is unrelated to the purposes of absentee voting and that does not serve any compelling state interest.

New York has absolutely disenfranchised pretrial detainees and misdemeanants, although both classes are qualified voters under state law, by means of an irrational distinction between persons confined for medical reasons and persons confined and unable to appear in person for voting because of a "judicial disability." There are, we submit, no compelling reasons for denying the right to vote to persons "judicially disabled," while extending that right to other persons confined and unable to appear in person. Nor is there any compelling reason for denying appellants the franchise when New York has extended absentee voting to persons absent from the county of their residence because of federal service, attendance at an institution of learning, or because of duties, occupation, business or vacation. To the extent that any state interests are at all related to the statutory classifications, they may be adequately served by "* * * other, reasonable ways * * * with a lesser burden on constitutionally protected activity * * *." *Dunn v. Blumstein*, 405 U. S. at 343.

New York has suggested no compelling interest that is sufficient to justify the denial of appellants' right to vote. *Goosby v. Osser*, 409 U. S. 512 (1973), demonstrates that New York's reliance of *McDonald v. Board of Elections*, 394 U. S. 802 (1969), is entirely misplaced. This record conclusively shows, unlike the record in *McDonald*, that New York has absolutely precluded appellants from voting. Accordingly, New York must show much more than a state interest that will justify an incidental burden on the right to vote; it must demonstrate that it has sufficient grounds for absolutely precluding a class of citizens from voting. New York's failure to even suggest a compelling state interest renders its position untenable.

C. Because New York has absolutely precluded appellants from voting, *Goosby v. Osser* demonstrates that *McDonald v. Board of Elections* is not controlling.

The decision of the New York Court of Appeals leaves appellants, and all other persons hereafter similarly situated, with no means of registration and balloting. Although appellants have sought relief through the available administrative channels and have asked the state courts to frame a decree that would provide any means of voting, their requests have been denied and their petition dismissed.

Under these circumstances, the New York Court of Appeals was clearly mistaken in its reliance on *McDonald v. Board of Elections*, 394 U. S. 802 (1969). *McDonald* illustrates the narrow exception to the general rule requiring strict judicial scrutiny of classifications affecting the right to vote. The exception is applicable when the classification imposes no more than an "incidental burden" on the right to vote. *Bullock v. Carter*, 405 U. S. 134, 143 (1972) [citing *McDonald* for the proposition that

incidental burdens on the exercise of voting rights are not subject to the strict standard of review].

This court's decision in *Goosby v. Osser* demonstrates that *McDonald* does not support the unqualified proposition that the denial of absentee ballots has no impact on a pretrial detainee's exercise of the franchise.[11] In *McDonald* the Court was constrained to assume that the Illinois detainees could vote in person since they had not demonstrated that Illinois would foreclose alternative means of voting. 394 U. S. at 807-08, n. 6 and 7 at 808, and 809; see *Goosby v. Osser*, 409 U. S. at 519-21. Thus, the Court in *McDonald* contrasted the presumably surmountable burdens imposed on the Illinois detainees with the absolute barriers confronting persons medically disabled (394 U. S. at 809):

> Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot.

It is, indeed, ironic that *McDonald* has been advanced in support of the absolute denial of appellants' franchise

[11]The New York court relied on *McDonald* for its statement that the absentee provisions "have no direct impact on [appellants'] right to vote." As long as 1939, however, Mr. Justice Frankfurter, writing for the court in *Lane v. Wilson*, 307 U. S. 268, 275 (1939), held that the constitution forbids "onerous procedural requirements which effectively handicap exercise of the franchise * * * although the abstract right to vote may remain unrestricted * * *." The New York court's conclusion in the instant case leaves appellants with a "right" that they cannot exercise and in no different position than if that "right" had been denied.

when the Court there took such pains to state that it could not presume that Illinois would deny alternative means of voting because that denial would have clear constitutional implications.

In *Goosby* the Court found the challenge by the Pennsylvania detainees to be in "sharp contrast" to the challenge in *McDonald* because the Pennsylvania detainees alleged that means of voting in person had been denied. 409 U. S. at 522. Although holding no more than that "*McDonald* does not 'foreclose the subject' * * *" (409 U. S. at 522), the Court followed the general rule that the incidental burden exception applied in *McDonald* has no place when it is demonstrated that a class of citizens is absolutely precluded from voting. See also, *Rosario v. Rockefeller*, 36 L. Ed. 2d at 6-7. *Goosby* also departs from *McDonald's* statement that a legislature need not "strike at all evils at the same time." See *McDonald v. Board of Elections*, 394 U. S. at 809, 811. *McDonald*, we submit, applied the traditional presumption that a legislature has acted constitutionally and deferred to reform legislation only as part of the traditional equal protection test applicable when the burdens on voting are merely incidental. The rule is quite clear that a higher standard of judicial scrutiny is appropriate when it has been demonstrated that the right to vote is at stake.

This record demonstrates, in "sharp contrast" to *McDonald*, that New York is claiming the right to absolutely deny the exercise of the franchise by one class of qualified voters. That claim may not be upheld because New York has no "compelling state interest" that justifies the challenged disenfranchisement.

II.

New York's absentee voting provisions are unconstitutional under any standard of review.

Even where a statutory classification does not absolutely disenfranchise a class of citizens, the restrictions upon the exercise of the franchise may be "so severe as to constitute an unconstitutionally onerous burden on the * * * exercise of the franchise." *Rosario v. Rockefeller,* 36 L. Ed. 2d at 8. Under that standard of review, the particular limitation or burden is reasonable only if it is "tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary." *Rosario v. Rockefeller,* 36 L. Ed 2d at 9. New York's absentee voting provisions are unconstitutional even under the standard of review applied in *Rosario* because the classification denying the franchise to pretrial detainees and misdemeanants is invidious, unreasonable and arbitrary.

The state interests identified in *McDonald* as plausible justification for the classification are no longer adequate when appellants are denied all means of voting in person. In *McDonald* this Court sustained the denial of absentee ballots to persons judicially incapacitated because on that record it appeared merely more difficult for such persons to vote in person while persons medically disabled were absolutely unable to appear. That supporting reason has no application where, as established here, neither class can vote by means other than absentee ballots. Nor can the *McDonald* justification for the discrimination against persons incarcerated within their counties of residence, as contrasted to those absent from their counties of residence, be applied when in-county inmates are absolutely precluded from voting. The hypothetical evil that "local officials might be too tempted to try to influence the

local vote of in-county inmates" (394 U. S. at 810) can be cured by a number of less drastic means directed to the conduct of local officials. See, e. g., N. Y. Correction Law §500 (McKinney 1968); N. Y. Penal Law §195.00(1) (McKinney 1967); 7 NYCRR §5100.18 (1972).

New York, rather than providing a reasoned argument in support of the statutory discrimination, has merely labeled it a "function of attendant impracticalities or contingencies[12] [of state-imposed confinement]" 31 N. Y. 2d at 321. These attendant contingencies attached to state-imposed confinement, however, must themselves be strictly scrutinized to determine whether they unnecessarily compromise fundamental rights. See Point III, *infra*. Moreover, the fact of confinement merely means that a qualified voter is absolutely unable to appear in person for voting. It does not distinguish persons confined by reason of medical disability from those confined as pretrial detainees or misdemeanants.

In-county prisoners could, we submit, use precisely the same procedures to vote by absentee means as do medically confined voters: a request by mail by the qualified voter for an application, or a request in person on behalf of the person confined (N. Y. Election Law, §153-a [4]); the completion of the application and its return by mail, accompanied by a certificate of the administrative head of the institution; a determination by the board of elections as to whether the applicant is unable to appear personally and whether he legally qualifies to register

[12]If we correctly understand the opinion of the Court of Appeals, the "contingencies" are merely a set of facts including the state-imposed confinement, the inability to post bail (for detainees), the administrative and judicial denial of appellants' requests for the means to vote in person, and the construction of the absentee provisions to exclude persons confined in jail. The New York court has, we believe, avoided the constitutional question by merely restating the circumstances in which it arose.

and vote; and the mailing, completion and return of the ballot. Pretrial detainees and misdemeanants have the right to receive and transmit mail. (*Sostre v. McGinnis*, 442 F. 2d 178, 199-200 (2d Cir. 1971), cert. denied, *Oswald v. Sostre*, 405 U. S. 978 (1972); *Wright v. McMann*, 460 F. 2d 126 (2d Cir. 1972), cert. denied, 34 L. Ed. 2d 141 [1972]) and their exercise of the franchise by absentee means involves no greater burden on jail administrators than that involved in routine correspondence between the prisoner and his attorneys or other public officials. The sheriff's department has, in fact, informally expressed willingness to permit absentee means of voting (A. 22a).

Therefore, appellants submit that the absentee voting provisions, with the invidious discrimination between classes of qualified voters unable to appear in person, are repugnant to the equal protection guarantees of the United States Constitution under any standard of review.

III.

New York has not demonstrated that appellants' confinement necessarily precludes voting by absentee means or by paper ballot and hence New York must provide the means to protect that fundamental right.

It is now familiar law that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied, 325 U. S. 887 (1945); See *Sewell v. Pegelow*, 291 F. 2d 196, 198 (4th Cir. 1961); *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971). It is equally indisputable that lawful imprisonment does not remove de-

tainees or misdemeanants from the protection of the Fourteenth Amendment:

> Although it is true that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law.
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> *Washington v. Lee,* 263 F. Supp. 327, 331 (M. D. Ala. 1966) [quoting from *Price v. Johnston,* 334 U. S. 266, 285], aff'd. *per curiam,* 390 U. S. 333 (1968); see, *Johnson v. Avery,* 393 U. S. 483, 486 (1969); *Cooper v. Pate,* 378 U. S. 546 (1964).

Under these principles the courts have held that a state may not, subject to limited exceptions, deny a prisoner's First Amendment rights to receive and transmit mail, read newspapers and periodicals, and practice his religion. *Cooper v. Pate,* 378 U. S. 546 (1964); *Sostre v. McGinnis,* 442 F. 2d 178, 200-201 (2d Cir. 1971), cert. denied, *Oswald v. Sostre,* 405 U. S. 978 (1972); *Wright v. McMann,* 460 F. 2d 126 (2d Cir. 1972), cert. denied, 34 L. Ed. 2d 141 (1972); *Walker v. Blackwell,* 411 F. 2d 23 (5th Cir. 1969); *Jackson v. Godwin,* 400 F. 2d 529, 533, 541 (5th Cir. 1968). Similarly, New York may not deny its otherwise qualified prisoners the ability to exercise their most fundamental right. Just as access to the courts is a fundamental right which prison officials may not curtail, so access to the ballot is entitled to similar protection. Compare *Johnson v. Avery,* 393 U. S. 483 (1969) with *Love v. Hughes,* Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972).

In evaluating the claim by prison officials that a particular right must give way to the necessary implications of prison life, the courts have stated that

> rigid scrutiny must be brought to bear on the justifications for encroachments on [fundamental] rights. The state must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement [citations omitted] and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. [citations omitted.]

Jackson v. Godwin, 400 F. 2d 529, 541 (5th Cir. 1968).

The right to vote ". . . is a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights. . . ." (*Reynolds v. Sims*, 377 U. S. 533, 561-562), closely related to the right to associate with the party of one's choice (See *Williams v. Rhodes*, 393 U. S. 23, 30-31), and an integral part of the right to petition for a redress of grievances. New York carries a heavy burden of justification when appellants' voting rights are denied because of state-imposed confinement. Unless the denial of all means of voting is a necessary, unavoidable consequence of confinement, New York may not discriminate between other qualified voters and appellants or, more particularly, between (a) those qualified voters charged with crimes but able to post bail and those qualified voters similarly charged but financially unable

to post bail;[13] and (b) those qualified voters convicted of misdemeanors who have completed their sentences, or have received suspended sentences or fines, and those qualified voters convicted of misdemeanors who are serving sentences in a jail in the county of their legal residence. See *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972).

Of all qualified voters, prisoners are the only class forcibly restrained by the state from attending the polls in person, and only the state has the ability to assure that this restraint will not unnecessarily compromise fundamental rights. Accordingly, the state, acting through local election officials and jail administrators, has a duty to provide some means for the exercise of appellants' fundamental right to vote, unless it can satisfactorily show that all means of voting are necessarily precluded because of the purposes or necessary consequences of the confinement.[14]

New York has failed to carry its burden of justification. The only legitimate state purpose served by pretrial detention is to assure the presence of an accused at trial

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[13]The state statutory scheme leaves intact the voting rights of persons financially able to post bail. That result conditions the full exercise of the franchise upon wealth, just as surely as does the poll tax, which was struck down in *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1964). Although appellants rely upon the claim that the right to equal treatment in voting is a fundamental right, sufficient by itself to require application of the strict equal protection test, it is surely correct, as Judge Burke has observed, that the New York scheme discriminates individiously against the "politically disconnected and the financially disabled" (*O'Brien v. Skinner*, 31 N. Y. 2d at 321 [dissenting opinion].

[14]Although this argument was presented in *McDonald v. Board of Elections*, 394 U. S. at 808, n. 7, it was not reached or decided because the Illinois detainees, unlike appellants here, had not exhausted state remedies.

when he is financially unable to post sufficient money bail to guarantee his appearance or when he is charged with committing an offense made non-bailable. This purpose can hardly be a basis for depriving a presumably innocent person of not only his liberty but also his fundamental right to participate in the democratic process, when the right to vote can so easily be protected. The decisions involving similar fundamental rights are clearly to the contrary. *Jones v. Wittenberg,* 323 F. Supp. 93, 100, 330 F. Supp. 707 (N. D. Ohio 1971), aff'd. *sub nom. Jones v. Metzger,* 456 F. 2d 854 (6th Cir. 1972); *Brenneman v. Madigan,* 343 F. Supp. 128, 138-40 (N. D. Cal. 1972); *Hamilton v. Lowe,* 328 F. Supp. 1182, 1191 (E. D. Ark. 1971).

The New York Court of Appeals has held that New York law does not deprive a misdemeanant of his right to vote. 31 N. Y. 2d at 320. New York law, although expressly disqualifying certain unpardoned felons, does not disenfranchise misdemeanants; nor does the New York Legislature have the authority to do so. See N. Y. Election Law §152 (McKinney Supp. 1972); N. Y. Const. Art. II, §§ 1, 3, 4, 5 (McKinney 1969). Accordingly, the New York Court of Appeals has held that the law does not intentionally impose a forfeiture of the right to vote as a punitive consequence of a misdemeanor conviction. That Court found that the right was "independently guaranteed," and that the forfeiture resulted solely as one of the "attendant impracticalities or contingencies" flowing from the "fact of incarceration . . . [in the county of the voter's legal residence]." 31 N. Y. 2d at 320-321. Therefore, it is unnecessary to decide whether such a forfeiture, if imposed by law, would be arbitrary and unreasonable. We need only consider whether the fact of confinement necessarily makes all means of voting so burdensome for the state as to justify the absolute denial of the right to vote.

Although we recognize that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . ." (*Price v. Johnston,* 334 U. S. 226, 287 (1948)), the right to vote is not among the rights that a misdemeanant or a detainee must necessarily surrender at the jailhouse door. Transporting prisoners to places of polling outside the jail may in fact be disruptive and expensive (31 N. Y. 2d at 319; See *McDonald v. Board of Elections,* 394 U. S. at 808 n. 7), but it hardly seems plausible that competent prison administrators, with the cooperation of the election officials, would be unable to implement procedures for voting within the institution. At least one three-judge district court has recognized that paper ballots could be used in prison. *Love v. Hughes,* Civ. No. 72-1081 (N. D. Ohio, filed Oct. 27, 1972). And in the instant case the Sheriff's assistant, apparently seeing no insurmountable problems, was willing to distribute forms for absentee registration and voting. (A 22). A system of voting using paper ballots made available to prisoners on election day would present no greater difficulties than the supervision of the present absentee system for out-of-county prisoners or of normal prison routine, including the prisoners' exercise of the rights to practice their religion, use the postal facilities, obtain health care, and confer with counsel. See minimum standards and regulations, promulgated by N. Y. State Commission of Correction, 7 NYCRR §§ 5100.5, 5100.6(b), 5100.7(a) and (b), 5100.9, 5100.11 (filed Sept. 25, 1972, eff. Sept. 25, 1972); N. Y. Correction Law §136 (McKinney Supp. 1972). These paper ballots may be prepared, with no burden on election officials, from the absentee ballots that are presently made available to other voters.

Under identical circumstances at least one three-judge court has held the denial of the right to vote to be unconstitutional. In *Love v. Hughes* (N. D. Ohio 1972; No.

C 72-1081), pretrial detainees and misdemeanants held in jails in Cuyahoga County raised the same two-pronged constitutional challenge as that presented here. The Court ordered county election officials to furnish the detainees and misdemeanants with printed paper ballots and to furnish sufficient manpower to facilitate voting at the jails. By so ordering, the Court found it unnecessary to decide the constitutionality of the Ohio absentee provisions excluding prisoners. Appellants submit that *Love v. Hughes* accords with sound constitutional theory and has applied a remedy appropriate here.

IV.

New York has imposed an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

Person awaiting trial in New York may vote, so long as they are financially able to post bond. Identically situated persons who are unable to post bond are totally disenfranchised. New York's procedure, which erects an arbitrary financial obstacle between a pre-trial detainee and access to the ballot, cannot survive constitutional scrutiny. *Harper v. Virginia Board of Elections,* 383 U. S. 663 (1966); *Bullock v. Carter,* 405 U. S. 134 (1972); *Boddie v. Connecticut,* 401 U. S. 371 (1971); *cf. Williams v. Illinois,* 394 U. S. 235 (1970).

In a long series of decisions, this Court has refused to sanction state procedures which condition access to fundamental rights upon the wealth of the person in question.[15]

During the forty years since *Powell v. Alabama*, this Court has handed down a consistent series of cases to assure that the "majestic equality" of the law, so scorned by Anatole France, becomes a reality in our legal system. Over and over again this Court has emphasized that access to fundamental rights—such as voting—cannot be made to depend upon a person's ability to pay. New York's current practice of permitting only those pretrial detainees who can afford to post bond to vote effects precisely the type of "squalid discrimination" between rich and poor which this Court has systematically sought to eradicate.

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[15]E.g., *Powell v. Alabama*, 287 U. S. 45 (1932); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Edwards v. California*, 314 U. S. 160, 181, 184 (1941); *Griffin v. Illinois*, 351 U. S. 12 (1956); *Burns v. Ohio*, 360 U. S. 252 (1959); *Smith v. Bennett*, 364 U. S. 365 (1961); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas v. California*, 372 U. S. 353 (1963); *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Roberts v. La Vallee*, 389 U. S. 40 (1967); *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969); *Boddie v. Connecticut*, 401 U. S. 371 (1971); *Bullock v. Carter*, 405 U. S. 134 (1972).

CONCLUSION.

For the reasons stated, the judgment appealed from should be reversed.

Dated: June 29, 1973.

Respectfully submitted,

WILLIAM D. EGGERS,
DAVID N. KUNKEL,
RUTH B. ROSENBERG,
New York Civil Liberties Union,
One Lincoln First Tower,
Rochester, New York 14604
Attorneys for Appellants.

Of Counsel:

RONALD L. BROWN,
Rochester, New York;

BURT NEWBORNE,
MELVIN L. WULF,
New York, New York.

APPENDIX A.

New York Election Law §117.

1. A qualified voter, who, on the occurrence of any general election, may be—

a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

b. unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

may vote as an absentee voter under this chapter.

2. A qualified voter desiring to vote at such election as an absentee voter for the reasons specified in subdivision one of this section who does not apply for an absentee ballot under the provisions of subdivision six of this section and who is not entitled to an absentee ballot without application under the provisions of section one hundred nineteen *must appear personally before the board of inspectors of the election district in which he is a qualified voter on one of the days provided by law for local registration,* or before the board of central registration when said board shall be open for registration or, if such voter is registered for the next general election, then before the board of elections not later than the seventh day

before such election, and make and verify before such board his affidavit, setting forth (a) his name and residence address, including the street and number, if any, or town and rural delivery route, if any; (b) that he is a qualified voter of the election district in which he resides; (c) in case he voted at the preceding general election, the election district, assembly district if in the city of New York, town or city, county and state where he so voted; (d) that he expects in good faith to be—

—unavoidably absent from his residence on the day of the next general election because he is, or will be on the day of such election, an inmate of a veterans' bureau hospital, specifying it, or

—unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on such day, or

—absent from the county of his residence, or, if a resident of the city of New York from said city, because he will be on vacation elsewhere on such day.

3. a. Where such duties, occupation or business are of such a nature as ordinarily to require such absence, a brief description of such duties, occupation or business shall be set forth in such affidavit.

b. Where such duties, occupation or business are not of such a nature as ordinarily to require such absence, such affidavit shall contain a statement of the special circumstances on account of which such absence is required.

* * *

d. Where a qualified voter expects in good faith to be absent on the day of the next general election because he will be on vacation elsewhere on such day, such affidavit shall also contain the dates upon which he expects to begin and end such vacation, the place or places where he expects to be on such vacation, the name and address of his employer, if any, and if self employed, a statement to such effect.

• • •

6. A qualified voter who expects in good faith to be—

—unavoidably absent from his residence on the day of the next general election by reason of being an inmate of a veterans' bureau hospital, or

—absent from the county of his residence, or if a resident of the city of New York from said city, on the day of the next general election by reason of being in federal service, a member of the armed forces or a student matriculated, or a superintendent or teacher employed, at an institution of learning located outside such county or city, as the case may be, or

—unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, on the day of the next general election because his duties, occupation or business require him to be elsewhere on such day, or

—absent from the county of his residence, or, if a resident of the city of New York from said city, on the day of the next general election because he will be on vacation elsewhere on such day,

may execute the affidavit required of other voters by subdivisions two to four inclusive of this section without appearing before one of the boards named in subdivision two and may mail or deliver such affidavit to the board of elections not earlier than the thirtieth and not later than the seventh day before the election.

* * *

7. The affidavit required of a voter entitled to apply for an absentee ballot under the provisions of subdivision six of this section may be sworn to or affirmed before any officer authorized to administer an oath, and if made by a voter who resides in an election district in which personal registration is required shall state that the affiant has registered, given the date of such registration.

* * *

9. Printed forms of applications for absentee ballots in accordance with the requirements of this section shall be provided by the board of elections. They shall be distributed only in the following manner:

(a) an appropriate number shall be delivered to each board of inspectors, with the election supplies required to be delivered by the provisions of section eighty-six or sections three hundred sixty-two and three hundred sixty-three.

(b) an appropriate number shall be retained by the board of elections for the purpose of furnishing an application form to each qualified voter who registers centrally; and

(c) an appropriate number shall be retained by the board of elections for the purpose of furnishing an application form to each qualified voter who applies therefor before the board of elections after being registered and of mailing an application form to each qualified voter who is entitled to make such application by mail, pursuant to the provisions of subdivision seven of this section.

Such application form shall not be furnished to any person, except as hereinbefore in this subdivision authorized.

(140-D)

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1058

EDWARD F. O'BRIEN, *et al.*,
Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF, *AMICUS CURIAE*, ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL, IN SUPPORT OF APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Amicus Curiae in Support
of Appellees
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Statement

Appellants have appealed to this Court from an order of the New York State Court of Appeals entered on the decision herein (31 N Y 2d 317, 391 N.E. 2d 134) which upheld the constitutionality of the New York State Election Law (§§ 117, 117-a and 153) which enables certain enumerated categories of voters to register and vote absentee, but which makes no provision for absentee registration and voting by appellants who are detainees at the Monroe County jail awaiting trial on various charges or serving sentences on misdemeanor convictions.

Interest of the *Amicus Curiae*

This brief is filed, *amicus curiae,* by the Attorney General of New York pursuant to his statutory duty to defend the constitutionality of State statutes. The position of the *amicus* here is to uphold the right of the State, by the enactment of what this Court has referred to as "remedial legislation", to extend the franchise to those who had previously been uable to exercise it notwithstanding the fact that the legislation may not immediately encompass all classes of persons who might benefit from it.

Questions Presented

The New York State Court of Appeals refused the appellants' requests for transportation to polling places or the establishment of voting facilities at the County jail. The Court of Appeals further held that New York State Election Law, §§ 117-a and 153, pertaining to absentee voting and registration by several other categories of voters, were not applicable to the appellants and that the failure to provide these absentee rights to the appellants did not deprive them of their equal protection guarantees. The questions presented are thus:

1. Are the New York State absentee voting and registration provisions unconstitutional insofar as they do not provide for absentee voting and registration by appellants who are incarcerated in a county jail while awaiting trial or serving sentences as convicted misdemeanants?

2. Have the appellants been denied constitutional rights because of the absence of absentee registration and voting statutes of which they might avail themselves?

Legislative History of Absentee Voting

A brief sketch of the development of and changes in the New York Election Law as it relates to absentee voting demonstrates the evolutionary process which has taken place. The grant of absentee voting rights has been systematically extended to various classes of citizens by statutory amendment. Election Law, § 117, as recodified in 1909 (chapter 22) and in 1922 (chapter 588) provided absentee ballots only for those qualified voters who, on the day of the general election, would be absent from their county of residence if their "duties, occupation or business" so required and provided that such voters would be elsewhere within the United States. The foregoing requirement was noted in an opinion rendered by the New York State Attorney General in 1932, wherein it was stated that there were no provisions for absentee voting and registration by persons who were crippled and confined to their homes (1932 Atty. Gen. 114).

Although, in 1934, a Federal employee, whose occupation took him from his county of residence, was himself entitled to an absentee ballot without making personal application therefor, his wife, not being included in the statutory scheme, was required to apply for the absentee ballot in person (1934 Atty. Gen. 169). By 1937 "inmates of soldiers' and sailors' homes" and of "United States veterans bureau hospitals" were added to the list of eligibles under section 117 (see *Sheils* v. *Flynn*, 252 App. Div. 238, 300 N.Y.S. 536, affd. 275 N.Y. 446, 11 N.E. 2d 1).

In 1944 the State Attorney General stated that prior to the amendment of section 117 by chapter 71 of the Laws of

1948, an absentee ballot could not be furnished to a Federal employee rendering service at the United States Embassy in Mexico because the applicant was then required to be within the territorial limits of the forty-eight States (1944 Atty. Gen. 370).

In 1956 the New York State Election Law was amended to provide for absentee voting by qualified voters unable to appear at the time of the general election because of illness or physical disability (Election Law, § 117-a). Also added to the Election Law in 1956 was provision for absentee registration by ill and disabled voters and by those whose duties, occupation or business require them to be outside New York State (Election Law, § 153-a [Section 153-a was repealed and the subject matter reenacted as Section 153 by Laws of 1972, ch. 962, eff. Jan. 1, 1973]).

New York State Election Law, § 117, subd. (1), presently provides:

> "A qualified voter, who, on the occurrence of any general election, may be—
>
> "a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or
>
> "b. unavoidably absent from the county of his residence, or if a resident of the city of New York, from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or
>
> "c. absent from the county of his residence, or if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election
>
> may vote as an absentee voter under this chapter."

Section 117, subd. 4 enables a spouse, parent or child of a person in any of the above-enumerated categories to qualify for an absentee ballot "[w]here a person is, or would be, if he were a qualified voter, entitled to apply for the right to vote by absentee ballot".

Section 117-a subd. 1 provides:

> 1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; but the right to apply for an absentee ballot as provided in this section shall not extend to any person having the right to aply for an absentee ballot under section one hundred seventeen on account of unavoidable absence from his residence because he is an inmate of a veterans' bureau hospital.

Decision Below

Five members of the Court of Appeals joined in holding that the New York State laws providing for absentee voting did not violate appellants' constitutional rights. Chief Judge Fuld and Judge Burke dissented in separate opinions.

After rejecting "out of hand" any scheme which would commit appellees to transporting appellants to a polling place or which would require polling facilities at the jail, the Court turned to the questions of whether appellants' incarceration is a physical disability under Election Law, § 117-a and if not, whether denial of an absentee ballot is a violation of equal protection of the law. The Court concluded that confinement to a penal institution is not a physicial disability contemplated by section 117-a.

The Court then turned to the equal protection question and stated as follows:

"Nor does the failure to provide these absentee rights deprive the petitioners of their equal protection guarantees. These provisions set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote (*Cf. Atkin* v. *Onondaga Co. Bd. of Elections*, 31 N Y 2d 401; *Dunn* v. *Blumstein*, 405 U. S. 330; see also *Kramer* v. *Union School Dist.*, 395 U. S. 621, 626-627). Such conditions must, of course be 'necessary to promote a compelling state interest' (*Dunn* v. *Blumstein*, 405 U. S. 330, *supra; Bullock* v. *Carter*, 405 U. S. 134, 143; *Atkin* v. *Onondaga Co. Bd. of Elections*, 30 N Y 2d 401, 404-405, *supra; Palla* v. *Suffolk Co. Bd. of Elections*, 30 N Y 2d 36, 49-50).

"The underlying right which is the subject of these proceedings is not the right to vote, that right is independently guaranteed, but merely a claimed right to absentee ballots, and in some instances, absentee registration. (*McDonald* v. *Board of Election*, 394 U. S. 802, 807; *Goosby* v. *Osser*, 452 F. 2d 39, 40 [3rd Cir., 1971]). And, since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (*McDonald* v. *Board of Election*, 394 U. S. 802, 809; *Goosby* v. *Osser*, 452 F. 2d 39, *supra*.) Measured in terms of this less stringent standard, at least one Federal court, on identical facts, has sustained a similar scheme under Pennsylvania law (*Goosby* v. *Osser*, 452 F. 2d 39, supra).

"In the end, petitioners' plaint is directed towards the consequences of their incarceration. In this regard, however, it is significant that they are not alone. Others, including poll watchers assigned outside their voting district, and those confined to mental institutions, to name just two groups who, absent an absentee ballot, would find it well-neigh impossible to vote, are similarly disadvantaged. Perhaps, the statutory scheme should be extended further to include all those so situated. The question has been posed before by a higher source (see *McDonald* v.

Board of Election, 394 U. S. 802, 809-810, *supra*); its resolution, nonetheless, is one for the legislature not the courts.

> "The right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design."

Chief Judge FULD, citing provisions of the State Constitution, dissented and concluded that the appellants are entitled to absentee ballots by virtue of Election Law, § 117-a. Judge BURKE concurred in Judge FULD's dissent and added that, in his opinion the precluding of absentee voting rights to the appellants is a violation of their rights of equal protection.

Summary of Argument

The basic question in this appeal concerns the extent to which the State may be required to proceed in the enactment of remedial legislation. There is not involved herein the enactment of discriminatory legislation which is designed to exclude members of a class. Rather, this case presents a circumstance where a category of persons, detainees in a county jail, has not yet been included in the continuing development of the absentee voting provisions of New York State. It is submitted by the State that the absence of such provision in its remedial legislation does not render the statutory scheme invalid and does not result in a denial of the appellants' guarantee of equal protection of the law.

ARGUMENT

POINT I

New York Election Law, §§ 117, 117-a and 153 should be judged by the traditional standards of reasonableness and rational relationship to legitimate State goals.

In the instant case, as in *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L. Ed. 2d 739) the provisions in question set forth no voter qualification or restriction such as wealth or race which denies the franchise to any group otherwise qualified to vote. It is the right to an absentee ballot rather than the right to vote which is at issue herein. Since, as in *McDonald*, the New York statutory scheme does not affect appellants' right to vote, this is, therefore, not a case for the application of the compelling state interest test (cf. *Dunn* v. *Blumstein*, 405 U. S. 330, 31 L. Ed. 2d 274; *Evans* v. *Cornman*, 398 U. S. 419, 26 L. Ed. 2d 370; *City of Phoenix, Ariz.* v. *Kolodziejski*, 399 U. S. 204, 26 L. Ed. 2d 523). Rather than being restrictive, discriminatory or "fencing out" in nature, Election Law §§, 117, 117-a and 153 are remedial in nature and serve to extend the franchise to those who would otherwise be deprived of the franchise. Under similar circumstances this Court has repeatedly held that such legislation must be reasonable and must bear a rational relation to a legitimate state goal (see e.g. *San Antonio School District* v. *Rodriguez*, ____ U. S. ____ 36 L. Ed. 2d 16 [1973]; *Fidell* v. *Board of Elections of City of New York*, 343 F. Supp. 913 affd. 409 U. S. 972, 34 L. Ed. 2d 236 [1972]; *Rosario v. Rockefeller*, ____ U. S. ____, 36 L. Ed. 2d 1 [1973]; *McDonald v. Board of Election Commissioners of Chicago, supra*).

In *Fidell* v. *Board of Elections of City of New York* (*supra*), the plaintiffs alleged a denial of equal protection as a result of New York State's failure to provide absentee ballots at primary elections. The three judge District Court held that it was sufficient that New York had demonstrated a *rational basis* for the lack of absentee balloting in primaries quoting from *Bullock* v. *Carter* (405 U. S. 134, 143, 31 L. Ed. 2d 92 [1972]) as follows:

> "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

It is submitted that the reform measures here under review, and the incidental burden not yet remedied thereby, are not subject to the stringent standard of review established by this Court. The New York State absentee registration and balloting statutes should be judged by the less stringent reasonableness test and the burden to demonstrate unconstitutionality is therefore placed upon the appellants. The statutory classifications will be set aside only if no grounds can be conceived to justify them (*McDonald* v. *Board of Elections Commissioners of Chicago*, 394 U. S. 802, 809).

POINT II

New York State's absentee ballot and registration statutes are a constitutionally valid exercise of the power of the State.

The history of the New York State absentee ballot and registration statutes, outlined *supra*, is strikingly similar to that of Illinois, described by this Court in *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L. Ed. 2d 739) as

> "not an arbitrary scheme or plan but, rather, the very opposite—a consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature." (id. at p. 811)

In New York, as in Illinois, the affected prison inmates are convicted misdemeanants and are trial detainees. In both states the inmates cannot obtain absentee ballots because they constitute one of several classes for whom the state legislatures have not provided absentee ballots. In neither state are such persons disenfranchised.[1] This is to be contrasted with the Pennsylvania statute, with which this Court was concerned in *Goosby* v. *Osser* (409 U. S. 512, 35 L. Ed. 2d 36), which affirmatively and absolutely excluded from its absentee voter provisions "persons confined in a penal institution".[2]

A review of the development of New York's absentee voter provisions *supra* since 1909 has revealed that initially only those qualified voters whose duties, occupation or business required them to be absent from their county of residence but within the United States were eligible to vote by absentee ballot. Inmates of veterans hospitals were added thereafter. The requirement of presence in the United States was then removed. Subsequently, eligibility for the absentee ballot by the spouse, parent or child of the voter[3] and absence by reason of vacation[4] was added to section 117. The absentee provisions underwent major revision by the addition of section 117-a relating to absentee

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[1] New York State Election Law, § 152, excludes convicted felons from the suffrage but not misdemeanants. Cf. Ill. Ann. Stat., Chap. 46, §§ 3-5.

[2] Pa. Stat. Ann. Tit. 25, § 2602, subd. 12.

[3] Laws of 1948 Chap. 71.

[4] Laws of 1964 Chap. 726.

voting by physically disabled persons and by the addition of the absentee registration provisions of section 153-a.[5]

To paraphrase the language of this Court in *McDonald* (*supra*), it is submitted that merely because New York has not gone still further should not render void its remedial legislation. Such legislation need not "strike at all evils at the same time". (*McDonald, supra* at p. 811; *cf. Fidell* v. *Board of Elections of City of New York*, 343 F. Supp. 913, affd. 409 U. S. 972 34 L. Ed. 2d 236; *San Antonio School District* v. *Rodriguez*, ____ U. S. ____ 36 L. Ed. 2d 16; *Katzenbach* v. *Morgan*, 384 U. S. 641, 16 L. Ed. 2d 828.)

The State has a legitimate and valid interest in the integrity of the electoral process (*Rosario* v. *Rockefeller*, ____ U. S. ____ 36 L. Ed. 2d 1, 9) and in *McDonald* (*supra* at p. 394) this Court noted that "the different treatment accorded unsentenced inmates within and those incarcerated without their resident counties may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates." The state legislatures have traditionally been allowed to take reform one step at a time, addressing themselves to the phase of a problem which seems most acute at the time (*McDonald, supra*). Here, as in *McDonald*, there remain several identifiable categories of voters who do not yet have access to absentee ballots (see opinion of New York State Court of Appeals, 31 NY 2d at p. 320) but, as has been shown, the State continues to pursue its course of remedial legislation and such efforts should be upheld.

There are, of course, numerous valid reasons why a defendant charged with crime may be detained pending

[5] Laws of 1956 Chap. 600.

trial rather than being released on bail (see *e.g. Carbo* v. *United States*, 82 S. Ct. 662, 7 L. Ed. 2d 769). It can no more be argued that the appellants' incarceration without absentee ballot rights is a violation of equal protection than it could be said that such incarceration unlawfully deprives them of their constitutional right to freedom of travel. "The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one." (Decision of the New York State Court of Appeals, 31 NY 2d p. 320.)

The present disability *re* voting thus experienced by the appellants by the fact of their incarceration is, it is submitted, of the type referred to by Justice BLACK in *Oregon* v. *Mitchell* (400 U. S. 112, 127, 27 L. Ed. 2d 272, 283), wherein he stated:

> "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

The New York State system of absentee voting should therefore be upheld by the application of the principle that remedial legislation should not be invalidated merely because it does not cover all classes of persons who might benefit from it (see *e.g. Fidell* v. *Board of Elections of City of New York, supra; Dandridge* v. *Williams*, 397 U. S. 741, 25 L. Ed. 2d 491; *Katzenbach* v. *Morgan, supra*).

POINT III

The distinctions made by the New York absentee provisions are not drawn on the basis of wealth.

The appellants contend that since persons who are financially unable to post bail[6] will be detained in prison and thereby disenfranchised New York is imposing an unlawful financial test for voting. *McDonald* v. *Board of Election Commissioners of Chicago* (394 U. S. 802, 22 L Ed 2d 739), was also concerned with pre-trial detainees who were unable to post bail but this Court did not conclude therein that there had been an invidious discrimination on the basis of wealth.

It is clear that not every statutory inequality resulting from differing financial circumstances amounts to a denial of constitutional rights (see *San Antonio School District* v. *Rodriguez* ____ U. S. ____, 36 L Ed 2d 16 [1973]). The entire system will not be struck down "simply because it imperfectly effectuates the State's goals" (*id.* ____ U. S. ____, 36 L Ed 2d 16, 53). It is clear that the absentee voting statutes were not drawn to discriminate against persons on the basis of wealth and that any such incidental result is not tantamount to a denial of constitutional rights. As stated by the New York State Court of Appeals, "these handicaps * * * are functions of attendant impracticalities or contingencies, not legal design." (31 NY 2d at p. 321.)

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[6] The record does not appear to establish that any of the appellants are, in fact, in this category.

CONCLUSION

The Order of the New York Court of Appeals should be affirmed.

Dated: July 25, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Amicus Curiae in Support
of Appellees
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General

of Counsel

APPE

BR

ELLEE'S

IEF

In the

Supreme Court of the United States

No. 72-1058

EDWARD F. O'BRIEN, et al.,

Appellants,

v.

ALBERT SKINNER, Sheriff, Monroe County, et al.,

Appellees.

BRIEF FOR APPELLEES

WILLIAM J. STEVENS
307 County Office Building
Rochester, New York 14614
Attorney for Appellees

Of Counsel:
MICHAEL K. CONSEDINE
Rochester, New York

Daily Record Corporation
Rochester, New York
(11187)

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In the

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Appellees.

BRIEF FOR APPELLEES

Opinions Below

The opinion of the Lower Courts as stated in the Brief for Appellants is substantially correct.

Jurisdiction

The statement of jurisdiction in the Brief for Appellants is substantially correct.

Questions Presented

The Court of Appeals of New York has left to the New York State Legislature the question of remedying the absence of provisions in the New York Election Law which would allow pre-trial detainees and misdemeanants incarcerated within the county of their residence to register and vote by absentee or other means. (New York Election Law, §§117(6), 117-a, 153-a)

The questions presented are these:

1. Does the fact that the New York State Legislature has not yet established the right to an absentee ballot or absentee registration procedure for misdemeanants and pre-trial detainees incarcerated in their counties of residence cause the above mentioned New York Election Law sections to be subject to the stringent standards of the Fourteenth Amendment.

2. Do the above mentioned sections of the New York Election Law have some rational relationship to a legitimate state end.

3. Do the above mentioned sections of the New York Election Law impose an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail.

4. Do the above mentioned sections of the New York Election Law absolutely disenfranchise the appellants.

Statutes Involved

The Brief for Appellants as to statutes involved is substantially correct. (New York Election Law, §§153-a, 117-a and pertinent parts of §117)

Statement of the Case

The State of New York has through its Election Law expanded the privilege of voting and registering by absentee methods throughout the last fifty years to include persons absent from their county of residence because of duties, occupations or business or because of illness or physical disability (in this case, such persons may still be present in their county of residence but be unable to attend the polls).

Such persons seeking to register and vote by absentee methods must provide sworn affidavits describing the facts which would cause their absence, or in the case of persons requesting absentee registration and ballots who are in a hospital or confined to their homes because of illness or physical disability, must present a

medical certificate attesting to their physical inability to register and vote in person.

There are, however, no provisions in the New York Election Law which provide the right to absentee ballot or registration to persons incarcerated in the county of their residence while awaiting disposition of their case or serving sentences as misdemeanants. It is to be noted that there are no provisions which deny such persons the aforementioned right to receive absentee ballots and to register by absentee method. The New York State Election Law is simply silent on this matter.

The issue presented is this:

Is this absence, in the New York Election Law, of provisions granting the above mentioned prisoners the right to register and vote by absentee methods, an absolute prohibition imposed upon a class from exercising the franchise, thus rendering it unconstitutional, or is it otherwise unconstitutional.

Statement of Facts

The appellants are seventy-two persons who were at the time of initiation of this law suit incarcerated in the Monroe County Jail and who alleged that they were non-felons and pre-trial detainees or serving misdemeanor sentences. Although the League of Women Voters allege they attempted to obtain procedures which would permit such detainees as aforementioned the privilege of registering and voting, there was no application to the Board of Elections by any individual who sought this privilege until October 10, 1972. Slightly before that time, the League caused to be distributed throughout the jail population application forms on which each appellant recited his residence and proclaimed his desire to register and vote (A 21a - 22a; A 25a - 28a). On the date aforementioned, these forms were presented to the Board of Elections of Monroe County, this being the last day for registration.

The Commissioners of Election, in the absence of provisions in the Election Law as above cited, refused to issue absentee forms for either registration or ballot to the seventy-two prisoners. The Board felt further that the aforementioned detainees were not qualified under the Election Law for such absentee participation in the election process.

On October 11, 1972 the appellants commenced an action in the New York Supreme Court of Monroe County for an order directing the Sheriff and the Commissioners of Election to provide some means of registering and voting the seventy-two detainees aforementioned, either by absentee means or in person, should they prove to be otherwise eligible. There is no issue here as to the right of the Board of Elections to disqualify any of these seventy-two detainees for valid grounds, such as prior felony convictions or non-residence in the community, or any other valid ground under the New York Election Law. The issue is, can the Board of Elections be compelled to provide a method of registration and voting for these persons. The Supreme Court Judge ordered that those persons who had registered prior to incarceration be allowed to vote by absentee ballot but that those who had not registered should be denied the absentee ballot. Both parties appealed to the New York State Appellate Division, Fourth Department, which Appellate Court held that the appellants should be allowed to register and vote by absentee means in that they were unable to appear because of physical disability and thus came under the New York Election Law. The appellees herein immediately appealed to the New York Court of Appeals, which, on November 3, 1972, reversed the Appellate Division. The New York Court of Appeals held that the sections referred to by the Appellate Division involving physical disability refer to a medically disabled person and the fact of confinement to a penal institution does not entitle a voter to avail himself of these absentee privileges (P. 319). The Court held further that the underlying right which is the subject of these proceedings is not the right to vote but merely a claimed

right to absentee ballots and/or absentee registration. Since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (P. 320) The Court held that:

> "Under the circumstances and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged (poll watchers assigned outside the voting districts) it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then are functions of attendant impracticality or contingencies in legal design." (PP. 320-321)

From this decision, the appellants filed a Notice of Appeal to the United States Supreme Court. Probably jurisdiction was noted on May 7, 1973.

SUMMARY OF ARGUMENT

Do New York's absentee voting provisions absolutely disenfranchise the appellants, and if so, are they unconstitutional when evaluated under the most stringent equal protection standards

This Court has stated in such cases as *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), *Evans v. Cornman*, 398 U.S. 419, 421-422, 426 (1970) and *Reynolds v. Sims*, 377 U.S. 533, 562 (1963) that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standards. This principle has been cited by the appellants to promote their cause. The appellees disagree and argue that there has been no showing on the record that the appellants are absolutely disenfranchised in that (1) there is no showing that the appellants as a class could not vote by any other means, or (2) that any more than a small proportion of that class would be incarcerated during the time for registration or voting.*

*None of this class will be incarcerated for more than one year and most will be incarcerated for a fraction of a year.

However, even if this Court should feel that the class in question is absolutely disenfranchised, applying the most stringent standard of the equal protection clause would not render the New York statutes unconstitutional as the New York statutes show a rational relationship to a legitimate state end, i.e. these statutes expand the right to vote by absentee method to classes heretofore excluded, and that the fact that a class is excluded by omission doesn't render the statute unconstitutional.

Do the New York statutes in question create so severe a restriction on the franchise as to constitute an unconstitutionally onerous burden on the exercise of the franchise

In *Rosario v. Rockefeller, 36 L. Eds. 2d,* 1, 6 and 7 (1973), this Court has held that even those restrictions on the franchise which fall short of an absolute prohibition on voting may constitute an unconstitutionally onerous burden on the exercise of the franchise by their severity. The New York statutes in question impose no such burden upon the franchise but expand such franchise to those hitherto excluded.

The fact that a statute fails to remedy every ill or include every possible class in its purview does not render the same unconstitutional. The creation of new rights are particularly a function of the legislature. *Morgan v. Kennedy* 331 F. Supp. 861, at 863 (1971)

Do the New York statutes create an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail

The Court's ruling in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1964) and those following forbids the state' imposing the payment of a tax to vote. These New York statutes in question involve the right to register and vote by absentee ballot. There is no imposition of a tax or a financial test upon the appellants.

ARGUMENT I

Do New York's absentee voting provisions absolutely disenfranchise the appellants, and if so, are they unconstitutional when evaluated under the most stringent equal protection standards

It must be conceded that this Court has clearly established the principle that statutory classifications that absolutely disenfranchise a class of citizens must be evaluated under the most stringent equal protection standard. *Dunn v. Blumstein*, supra.

However, this Court has also established the principle that citizens have the power to impose voter qualifications and to regulate access to the franchise in other ways. *Carrington v. Rash*, 380 U.S. 89, 91 (1965). *Oregon v. Mitchell*, 400 U.S. 112, 114 (1970). Such qualifications must be closely scrutinized in light of the Constitution. In the instant case as in the case of *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) a constitutional attack is made upon state statutes which expand the franchise through absentee means to the classes heretofore excluded because of absence from the county of residents or because of physical incapacity, because such statutes do not include within their scope pre-trial detainees or misdemeanants incarcerated in their counties of residence. We have here an issue thus not of the right to vote, but rather the right to vote or to register by absentee methods. There is no question either of an absolute prohibition on appellants' right to franchise because the class under discussion has not been thought to be absolutely prevented from registering or voting. Only those members of the class who are incarcerated during registration and voting days are excluded and even those persons could have voted by absentee methods should they be residents of other counties.

It is to be remembered that none of the above classes could be incarcerated for more than one year and most are incarcerated for smaller fractions of a year.

A reading of the statute further indicates that the statute itself does not specifically and intentionally exclude this class of person and merely fails to provide for such a class from enjoying the privilege of voting by absentee method.

The class of person disenfranchised because of incarceration is so small that even the stringent application of the Fourteenth Amendment does not render the failure to include them under New York statutes unconstitutional.

The Court of Appeals of New York State was not unreasonable in holding that these statutes are not repugnant to the Fourteenth Amendment because the handicaps imposed upon the appellants "are functions of attendant impracticalities or contingencies, not legal design." *O'Brien v. Skinner, et al.*, 31 N.Y. 2d 318 (1972). Certainly, it is not suspected classification based on wealth or race. *Harper v. Virginia Board of Elections*, supra. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

Should this Court order the State of New York to provide means for registering pre-trial detainees, this Court could be venturing deeply into the political thicket, making decisions best left to the Legislature.

Courts should not lightly intrude upon functions which are properly within the assigned powers of the legislature, unless the legislature fails to comply with constitutional requirements — after being given an opportunity to do so. *Montano v. Lee*, 298 F. Supp. 862 (1966) at 864.

A rational view of this Court's holdings regarding the franchise indicates that this Court will not permit a state to embark upon a course of disenfranchising classes of persons for such reasons as wealth, the color of their skin or their sex. It is indeed reasonable for a Court to hold such classifications to be improper. However, it is not unreasonable for a state to exclude persons who are absent from their polling place from voting. The fact that they have nonetheless extended this privilege to certain persons who are absent from their polling place, does not taint

the statutes conferring this privilege with a violation of the Fourteenth Amendment because other persons have not been included in the privilege. To do so would be to make the Supreme Court of the United States a super-legislature. It is interesting to note that nowhere has it been shown that any efforts were made by the appellants to have the New York State Legislature include them as a class under the purview of the statutes in question.

ARGUMENT II

Do the New York statutes in question create so severe a restriction on the franchise as to constitute an unconstitutionally onerous burden on the exercise of the franchise

The appellants cite *Rosario v. Rockefeller*, supra, and allege that even if these statutes should fall short of an absolute prohibition on voting, they constitute an unconstitutionally onerous burden in the exercise of the franchise by their severity. However, it is obvious that these statutes in question impose no burden upon the franchise, but indeed expand the franchise to classes of persons who heretofore have been denied that privilege.

The appellants rely heavily on *Goosby v. Osser*, 409 U.S. 512 (1973) in an attempt to distinguish *McDonald*, supra, from the instant case. The Pennsylvania statutes in *Goosby v. Osser*, supra, specifically excluded pre-trial detainees from obtaining the privilege of absentee ballot. The New York statutes, like the Illinois statutes in *McDonald*, supra, are silent on this subject. Therefore, it would certainly be reasonable for this Court to hold that *McDonald*, supra, does not foreclose the Lower Courts from inquiring in *Goosby* as to whether or not the Pennsylvania statutes are constitutional.

However, in the case where the exclusion is not specifically mentioned, as in the New York case, this Court has upheld similar statutes in *McDonald*, supra. It may be beneficial for the

community to include pre-trial detainees in the franchise. On the other hand, it may be wise for a community to exclude such persons for such reasons as to prevent the widespread voting of jail prisoners by corrupt political machines.

There are many conceivable issues which should be weighed by a legislative body when considering extension of the absentee ballot and this Court has neither the time nor the constitutional mandate to go into this consideration when it appears that there is no question here of a class being unconstitutionally denied its franchise. The question of extending the right to an absentee ballot is a legislative one.

This issue seems clearly a legislative issue. The fact that a statute fails to remedy every ill or include every possible class in its purview, does not render the same unconstitutional. The question of new rights are particularly a function of the legislature. *Reynolds v. Sims*, supra.

ARGUMENT III

Does the New York statute create an unlawful financial test for voting by denying the franchise to pre-trial detainees who cannot post bail

Unlike the poll tax which would exclude any citizen from voting who could not afford to pay the same, or unlike the imposition of property qualifications, the New York statutes merely refer to the extension of the right to vote by absentee methods to classes heretofore denied the same. It does not impose a financial test on anyone. It is merely a circumstance that a person is incarcerated in jail and is required to meet bail. The bail laws were not created to prevent a person from voting but to assure the presence of a prisoner before the Court. The class of persons so denied the franchise is so small and the class of persons thus discernable is so shifting and imprecise* as to render them not in

*Such persons would frequently be convicted of a felony before they receive the absentee ballot but subsequent to registering. Others would complete their sentences as misdemeanants and leave jail without return addresses. Others would make bail and disappear.

any way within the same class referred to in *Harper v. Virginia Board of Elections*, supra, or other classes declared by this Court to be suspect.

Any person familiar with the thrust of our constitutional history is certainly not alarmed by this Court's decision outlawing such financial tests as the poll tax or property qualifications but to extend to persons held because they cannot meet bail the same stringent standards applied to those who could not pay their poll tax, would be extending unreasonably the protection of the Fourteenth Amendment.

If it is constitutional for states to impose bail thus allowing those who can post it to remain at large and those who cannot post it to remain incarcerated, it is certainly not an unconstitutional financial test because some persons who make bail can go to their polling place to vote while those who cannot are denied the franchise.

CONCLUSION

For the reasons stated, the judgment appealed from should be upheld.

Respectfully submitted,

WILLIAM J. STEVENS
307 County Office Building
Rochester, New York 14614
Attorney for Appellees

Of Counsel:
MICHAEL K. CONSEDINE
Rochester, New York

O'BRIEN ET AL. *v.* SKINNER, SHERIFF, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 72–1058. Argued November 6, 1973—Decided January 16, 1974

Appellants, who are incarcerated in jail as convicted misdemeanants or pretrial detainees unable to make bail but who are under no voting disability under state law, and who requested but were denied the right to register and vote under mobile registration, absentee voting, or other procedures, brought this action challenging the constitutionality of the New York election laws. The contested statutes allow qualified persons to register and vote by absentee measures if precluded from personally doing so because of illness, physical disability, their duties, occupation, or business, and permit absentee voting (but not registration) if the voters are vacationing away from their residence on election day or are confined in a veterans' hospital. The state trial and intermediate appellate courts initially viewed appellants' confinement as physical disability and held that they were entitled to vote by absentee ballot. The New York Court of Appeals reversed that determination, concluding that the disability imposed by incarceration did not come within the terms of the statute. *Held:* The challenged provisions as thus construed, which raise no question of disenfranchisement of persons convicted of criminal conduct and permit incarcerated persons to register and vote by absentee means if confined in a county where they are not residents, violate the Equal Protection Clause of the Fourteenth Amendment, as they arbitrarily discriminate between categories of qualified voters. Pp. 528–531.

31 N. Y. 2d 317, 291 N. E. 2d 134, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. MARSHALL, J., filed a concurring opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 531. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 535.

William D. Eggers argued the cause for appellants. With him on the brief were *David N. Kunkel, Ruth B. Rosenberg, Burt Neuborne,* and *Melvin L. Wulf.*

Michael K. Consedine argued the cause and filed a brief for appellees.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Appeals of New York taken by 72 persons who were at the time of the trial of the original action, detained in confinement. Some are simply detained awaiting trial, others are confined pursuant to misdemeanor convictions; none is subject to any voting disability under the laws of New York.

The Court of Appeals of New York,[1] by divided vote, held that failure of the State to provide appellants with any means of registering and voting was not a violation of the New York statutes and not a denial of any federal or state constitutional right.

Before the November 1972 general elections in New York, the appellants applied to the authorities of Monroe County, including the Board of Elections, to establish a mobile voters registration unit in the county jail in compliance with a mobile registration procedure which had been employed in some county jails in New York State. This request was denied and appellants then requested that they be either transported to polling places under appropriate restrictions or, in the alternative, that they be permitted to register and vote under New York's absentee voting provisions which, essentially, provide that qualified voters are allowed to register and vote by absentee measures if they are unable to appear personally because of illness or physical disability, or because of

**Louis J. Lefkowitz, pro se,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *William J. Kogan,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

[1] 31 N. Y. 2d 317, 291 N. E. 2d 134 (1972).

their "duties, occupation or business." The statutes also allow absentee voting, but not registration, if the voter is away from his residence on election day because he is confined in a veterans' hospital or is away on vacation.[2]

[2] At the time this permit was sought, N. Y. Election Law § 153-a (Supp. 1971-1972) provided, in pertinent part:

"1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law."

Effective January 1, 1973, § 153-a was repealed, and replaced by N. Y. Election Law § 153 (Supp. 1972-1973), which contains substantially identical provisions.

N. Y. Election Law § 117-a (1964) provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter . . . ."

N. Y. Election Law § 117 (1964) provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be—

"a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

"b. unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

"c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

"may vote as an absentee voter under this chapter."

The election authorities denied the request, taking the position that they were under no obligation to permit the appellants to register or to vote in person and that inmates did not qualify for absentee voting under the provisions of the New York statutes.

The Supreme Court for Monroe County in New York considered the claims presented by the appellants and treated them as a proceeding in the nature of mandamus. The conclusion reached by that court was that the legislature of New York had provided for absentee registration and voting by any voter unable to appear personally because of confinement in an institution (other than a mental institution). The court concluded that the election laws should be construed to apply to an inmate confined in jail and not otherwise disenfranchised since this constituted a "physical disability" in the sense that he was physically disabled from leaving his confinement to go to the polls to vote, and that the statute therefore entitled such persons to vote by absentee ballot. However, the court noted that there was no showing that any of the persons claiming these rights had timely filed all the necessary forms but that this could yet be accomplished in time for voting by absentee ballot in November 1972. The Appellate Division of the Fourth Judicial Department of the Supreme Court of New York on review gave a similar construction to the election laws, stating:

> "We believe that petitioners, being so confined, are physically disabled from voting and should be permitted to do so by casting absentee ballots." 40 App. Div. 2d 942, 337 N. Y. S. 2d 700 (1972).

On appeal to the New York Court of Appeals, however, these holdings were reversed, that court stating:

> "The right to vote does not protect or insure against those circumstances which render voting impracti-

cable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design." 31 N. Y. 2d 317, 320–321, 291 N. E. 2d 134, 136–137.

Judge Fuld dissented, being of the view that §§ 117–a and 153–a of the Election Law of New York should be read in the manner announced by the Appellate Division. Judge Burke, joining Judge Fuld, agreed, stating additionally that any construction of the election law precluding appellants from exercising their right to register and vote violated the equal protection guarantees of the Fourteenth Amendment.

It is important to note at the outset that the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct. As we noted earlier, these appellants are not disabled from voting except by reason of not being able physically—in the very literal sense—to go to the polls on election day or to make the appropriate registration in advance by mail. The New York statutes are silent concerning registration or voting facilities in jails and penal institutions, except as they provide for absentee balloting. If a New York resident eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote and he may also register by mail, presumably because he is "unavoidably absent from

the county of his residence." N. Y. Election Law § 117 (1)(b) (1964).[3]

Thus, under the New York statutes, two citizens awaiting trial—or even awaiting a decision whether they are to be charged—sitting side by side in the same cell, may receive different treatment as to voting rights. As we have noted, if the citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county. Although neither is under any legal bar to voting, one of them can vote by absentee ballot and the other cannot.

This Court had occasion to examine claims similar to those presented here in *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802 (1969). There a state statute provided for absentee voting by persons "medically incapacitated" and for pretrial detainees who were incarcerated outside their county of residence. Unlike the present case, however, in *McDonald* "there [was] nothing in the record to show that appellants [were] in fact absolutely prohibited from voting by the State . . . ," *id.*, at 808 n. 7, since there was the possibility that the State might furnish some other alternative means of voting. *Id.*, at 808. Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof.

More recently in *Goosby* v. *Osser*, 409 U. S. 512 (1973), the Court again considered the problem of inmate voting and concluded that, unlike the voting restrictions in the *McDonald* case, the statute there in question was an

[3] At oral argument, counsel for the appellees conceded that Monroe County election officials have interpreted the portions of New York Election Laws §§ 117 and 153-a that extend absentee voting and registration privileges to those whose "duties, occupation or business" require absence from their home counties as including convicted misdemeanants and pretrial detainees incarcerated outside Monroe County.

absolute bar to voting because of a specific provision that "persons confined in a penal institution" were not permitted to vote by absentee ballot. It is clear, therefore, that the appellants here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed.

New York's election statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary. As we have noted, New York extends absentee *registration* privileges to eligible citizens who are unable to appear personally because of "illness or physical disability," and to citizens required to be outside their counties of residence on normal registration days because of their "duties, occupation or business." In addition, New York extends absentee *voting* privileges to those voters unable to get to the polls because of illness or physical disability, to those who are inmates of veterans' bureau hospitals, and to those who are absent from their home county on election day either because of "duties, occupation or business" or vacation. Indeed, those held in jail awaiting trial in a county other than their residence are also permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reason in the county of their residence are completely denied the ballot. The New York statutes, as construed, operate as a restriction which is "so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise." *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973). Appellants and others similarly situated are, as we have noted, under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote.

The construction given the New York statutes by its trial court and the Appellate Division may well have been a reasonable interpretation of New York law, but the highest court of the State has concluded otherwise and it is not our function to construe a state statute contrary to the construction given it by the highest court of a State. We have no choice, therefore, but to hold that, as construed, the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

Reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring.

While I join the opinion of the Court, my analysis of the issues presented here requires further elaboration.

I fully agree with the Court's holding that the Court of Appeals' reliance on our decision in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969), was misplaced. Although we rejected in *McDonald* a claim similar to that presented by appellants here, the crux of our decision was our conclusion that the rational basis test was the proper standard to apply in evaluating the prisoners' equal protection claims. We relied heavily in *McDonald* on the fact that there was no evidence that the State made it impossible for the appellants to exercise their right to vote. As the Court noted,

> "[T]he record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow

some inmates to get to the polls on their own." *Id.*, at 808 n. 6.

The Court therefore characterized the appellants' claim by saying "[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.*, at 807. Because of the relatively trivial inconvenience encountered by a voter unable to vote by absentee ballot when other means of exercising the right to vote are available, the Court properly rejected appellants' contention that strict scrutiny of the statutory classifications was required.

In this case, however, the New York Court of Appeals has made clear that the fundamental premises on which *McDonald* was based are absent. See *Goosby* v. *Osser*, 409 U. S. 512, 518–522 (1973). The New York court "reject[ed] out of hand" any alternative which would permit appellants to vote without using absentee ballots.[1] In this posture, it can no longer be contended that this case involves "merely a claimed right to absentee ballots" and "not the right to vote," or that the challenged statutes "have no direct impact on [appellants'] right to vote," as the Court of Appeals, relying on *McDonald*, argued, 31 N. Y. 2d, at 320, 291 N. E. 2d, at 136; such statements, in the context of this case, fly in the face of reality. Nor can it be contended that denial of absentee ballots to appellants does not deprive them

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[1] The Court of Appeals stated:

"We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions . . . or, would threaten like hazards embraced by such schema." 31 N. Y. 2d 317, 319, 291 N. E. 2d 134, 135 (1972).

Presumably this includes a flat rejection of the possibility of temporary reductions in bail to allow detainees to vote suggested by the Court in *McDonald*.

of their right to vote any more than it deprives others who may "similarly" find it "impracticable" to get to the polls on election day, see 31 N. Y. 2d, at 320–321, 291 N. E. 2d, at 136–137; here, it is the State which is both physically preventing appellants from going to the polls and denying them alternative means of casting their ballots. Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these appellants.

It is well settled that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein*, 405 U. S. 330, 337 (1972), quoting *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); see also *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 205, 209 (1970). It is this standard of review which must be employed here.

New York law provides for absentee registration and voting by numerous categories of voters who may be unable to appear in person at the polls. New York permits absentee registration and voting by, *inter alia*, those who are unable to appear personally because of illness or physical disability, or those whose duties, occupation, or business takes them out of their county of residence. Absentee ballots are even available to those who are on vacation outside the county on election day. Significantly, it is also conceded that pretrial detainees and convicted misdemeanants residing in Monroe County but confined *outside* the county may register and vote by mail.[2]

[2] As the Court emphasizes, New York law does not disenfranchise either convicted misdemeanants or persons being held for trial on criminal charges. Indeed, it appears that the New York Constitution does not permit such disenfranchisement. Article II, § 1, of the

In light of these extensive provisions for participation in the electoral process through the mail by others, New York's exclusion of pretrial detainees and convicted misdemeanants confined in the county of their residence cannot withstand analysis. The only basis even suggested for this discrimination is the possibility recognized by the Court in *McDonald* "that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates." 394 U. S., at 810. Though protection of the integrity of the ballot box is surely a legitimate state concern, I frankly find something a bit disturbing about this approach to the problem. It is hard to conceive how the State can possibly justify denying any person his right to vote on the ground that his vote might afford a state official the opportunity to abuse his position of authority. If New York truly has so little confidence in the integrity of its state officers, the time has come for the State to adopt stringent measures to prevent official misconduct, not to further penalize its citizens by depriving them of their right to vote. There are surely less burdensome means to protect inmate voters against attempts to influence their votes—the alternatives suggested by the Court in *McDonald*, for example.

I thus have little difficulty in concluding that the asserted state interest is insufficient to justify the statutes' discrimination against pretrial detainees and convicted misdemeanants under the compelling-state-interest test. I think it is clear that the State's denial of all opportunity for appellants to register and vote deprives them of the

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Constitution provides that "[e]very citizen shall be entitled to vote" and Art. II, § 3, excludes only those "convicted of bribery or of any infamous crime." We therefore need not confront in this case the very substantial constitutional problems presented if a State did seek to exclude these classes from the franchise.

right to vote on an equal basis with other citizens guaranteed under the Equal Protection Clause.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Once again, we are confronted with a claim, fashionable of late, that a state statute which, because of its positive provisions, *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973); *Kusper* v. *Pontikes*, *ante*, p. 51; see *Goosby* v. *Osser*, 409 U. S. 512 (1973), or because of its failure to provide particular persons particular relief, as here, is an unconstitutional deprivation of the right to vote. And once again the Court strikes down the state statutes.

Because I think the Court is unnecessarily and unwisely elevating and projecting constitutional pronouncement into an area—and into distant and obscure corners of that area—that, for me, should be a domain reserved for the State's own housekeeping, I dissent.

I join, and with some emphasis, the Court's observations and those of MR. JUSTICE MARSHALL in his concurring opinion, to the effect that the much-amended New York statutes here under challenge cut unevenly. Surely, no one would claim that they are now a model of the draftsman's art. The absentee-voting privilege appears to be available for the voter who is an inmate of a veterans' bureau hospital, N. Y. Election Law § 117 (1964), but not, seemingly, due to the statute's silence (unless he can otherwise qualify "because of illness or physical disability," *id.*, § 117-a), for the voter who is just as nonambulatory, and just as confined, in some municipal or denominational institution. It is available, under § 117, for the voter, "unavoidably absent" on business, and even for the voter "absent" on vacation, but not, seemingly, for the voter who is absent attending a wedding or visiting a seriously

ill relative in the next State. And it is concededly available for the occupant of the county jail who resides in another New York county but not for the occupant who resides in the local county.

These are irritating and less-than-thoughtful *sub silentio* distinctions, and the temptation to eliminate them by striking down the statutes is strong and appealing. I am not convinced, however, that we should be so ready to interfere. New York's present statutory structure has developed by successive remedial amendments, each designed to correct a then-apparent gap. The State, after all, as a matter of constitutional requirement, need not have provided for *any* absentee registration or absentee voting. And

> "a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. . . ." *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 809 (1969).

See also *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972).

Furthermore, this fallout from the New York statutes is minor and collateral and not of great, let alone constitutional, import. There is bound to be a dividing line somewhere, intended or unintended (as I suspect this was). If that dividing line operates to deprive a person of what he feels is his right to vote, his reaction will be critical. Whether he has a constitutional claim, however, is something else again. Line drawing is necessary, as the Court conceded in *Dunn* v. *Blumstein*, 405 U. S.

330, 348 (1972), and by the very process of line drawing, someone will be left out or treated differently.

I feel, therefore, that any unequal effect of the New York statutes is largely incidental and wholly a function of the State's failure to extend its remedial provisions a little further. These appellants are affected, to be sure, but they are affected because it was their misfortune to be detainees or convicted misdemeanants serving their sentences in the county jail on the critical day. The misdemeanants were in jail through their own doing, just as the petitioners in *Rosario* v. *Rockefeller, supra,* found themselves unable to vote because of their failure to meet an enrollment deadline. The plight of detainees elicits concern, of course, for a detainee may not be guilty of the offense with which he is charged. Yet the statutes' effect upon him, although unfortunate, produces a situation no more critical than the situation of the voter, just as unfortunate, who on election day is away attending the funeral of a loved one in a distant State. These are inequalities, but they are the incidental inequalities of life, and I do not regard them as unconstitutional.

I would refrain from continued tampering and interference with the details of state election laws. If details are deserving of cure, the State's legislature, not this Court, ought to be the curative agent.